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Nos. 346 and 347

IN THE

Supreme Court of the United States

October Term, 1939

UNITED STATES OF AMERICA,

Petitioner,

v.

SOCONY-VACUUM OIL COMPANY, INC., ET. AL.,

SOCONY-VACUUM OIL COMPANY, INC., ET. AL.,

Petitioners,

v.

UNITED STATES OF AMERICA.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

APPENDIX A TO BRIEF FOR THE RESPONDENTS—A DIGEST OF THE EVIDENCE

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Note: In this Appendix, as in the Statement of Facts contained in the brief, evidence which the trial court excluded is set out in brackets, thus [ ].

I.

A description of certain features of the oil industry.

A. Crude oil and its products.

The oil industry has four primary functions: (1) producing crude oil from the earth; (2) transporting it to refineries; (3) refining it into commercial products; and (4) marketing the products.

Crude oil—or "crude petroleum"—is a liquid mineral oil with a wide variety of physical and chemical characteristics.[1] It can be refined and manufactured into hundreds of products, including gasoline, kerosene, gas oil, diesel engine oil, asphalt, paraffin wax, fuel oil, and domestic burning oil.[2] Since the advent of the automobile, however, gasoline has overshadowed all the other products in importance.[3] In 1935, when most of the activities described herein took place, the United States produced 43,856,032,000 gallons of crude oil and consumed 17,742,202,000 gallons of gasoline.[4]

Gasoline is graded according to its "anti-knock" quality which is measured in "octanes".[5] During the indictment period there were three standard grades—"third grade", "regular", and "premium". Third grade gasoline had an octane rating of 62 or below, regular, an octane

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[1]Franklin, R. 917.

[2]Franklin, R. 929.

[3]Arnott, R. 1684-5.

[4]Def. Exs. 954, R. 3653; 726, R. 3189.

[5]Beroth, R. 178.

rating of 68-70, and premium, an octane rating of 71 or over.[6]

B. "Major integrated" and "independent, non-integrated" refiners.

So-called "major integrated oil companies" like the respondent Socony-Vacuum engage in every branch of the business, owning and operating oil wells, pipe-lines, refineries, bulk storage plants, and service stations.

Semi-integrated companies like the respondent Mid-Continent lack the facilities necessary for engaging in one or more of these branches of the business.

Non-integrated or "independent refiners" like the companies named in paragraphs 20 and 22 of the Indictment are engaged exclusively in refining.[1]

The industry also includes a number of other non-integrated elements such as independent producers who own and operate oil wells;[2] independent wholesalers or "jobbers" who sell gasoline in tank-wagon lots at bulk storage plants,[3] and independent dealers who operate service stations.[4]

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[6]Lanzer, cross, R. 267-8. There was also an intermediate grade with an octane rating of 63-67 but it was not formally recognized by the market journals quoting gasoline prices until April, 1936 (Beroth, R. 178-9; Lanzer, cross, R. 271; Steiger, R. 732-3).

[1]Beroth, R. 185; Franklin, R. 947; Shatford, R. 996.

[2]Beroth, R. 185.

[3]*Ibid.* Lanzer, R. 243. There are also a number of other types of middlemen; brokers (Beroth, R. 175, 176; Jacobi, R. 427), sales agents (Lanzer, R. 243-4), commission buying agents (Bradshaw, R. 670), cooperatives (Beroth, cross, R. 209; Lanzer, cross, R. 256-7), etc.

[4]Beroth, R. 185-6.

C. Technique of the industry.

1. *Production.*

Of the nineteen states which produce crude oil in commercial quantities, the most important are Oklahoma, Kansas, Texas, Louisiana and Arkansas.[1] These states contain three great producing areas: (1) the Mid-Continent fields which occupy Oklahoma and the adjacent portions of the other four states; (2) the so-called "East Texas field" in Northeast Texas, and (3) the Gulf Coast fields along the Gulf of Mexico.[2]

The oil-bearing formations, or "oil sands" in these fields lie from a few hundred feet to several miles below the surface.[3] They consist of porous sandstone or limestone containing oil.[4] The oil is usually found in association with gas and water, the heavier water being on the bottom, and the gas occupying the spaces in the porous stone above the oil.[5] The oil itself also contains gas which creates great pressure.[6] To be obtainable in commercial quantities, the oil must be trapped by a fold of impervious rock lying over, and enclosing the "sand".[7]

To extract the oil it is necessary to drill a well down through the impervious "cap-rock" to the oil-bearing sand.[8] If a well is properly directed, the pressure of gas

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[1]Beroth, R. 181; Franklin, R. 918.

[2]Beroth, R. 181. The East Texas field is really one of the Mid-Continent fields, but on account of its size and importance it is usually referred to by name as a separate field. (*Ibid.*)

[3]Franklin, R. 918-9.

[4]Franklin, R. 919.

[5]Franklin, R. 920.

[6]Franklin, R. 917, 921.

[7]Franklin, R. 919-20.

[8]Franklin, R. 920.

forces the oil to the surface, and a "flush well" or "gusher" results.[9]

Flush production—i.e., production resulting automatically from natural gas pressure—is only a temporary state. As soon as wells start flowing, both the pressure and the rate of production begin to decline. The more rapid the flow, and the greater the number of wells drilled in the pool, the more rapid the decine.[10] Eventually, flush production ceases and the well owners must install pumping equipment to bring the oil to the surface.[11]

As time goes on, even the production of pumping wells declines. The wells become "stripper wells" producing only from one to five barrels a day, and the production of even this small amount is very expensive.[12] Pumping and stripper wells produce almost one-fifth of the country's crude oil.[13]

2. *Crude oil transportation.*

After being produced, the oil is transported to the refinery by crude oil pipe-line. If the refinery is in the field itself, short "gathering" lines are used.[14] Many of the larger refineries, however, are in the consuming areas and along the Gulf Coast, and must be reached by long trunk pipe-lines.[15]

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[9]Franklin, R. 920-1, 922-3.
[10]Franklin, R. 922-3.
[11]Franklin, R. 923.
[12]Franklin, R. 923-4, 925.
[13]Franklin, R. 924-5; see Def. Ex. 954; R. 3653.
[14]Beroth, R. 182; Franklin, R. 925-6.
[15]Beroth, R. 181-3, 187-8; Shatford, R. 996-8.

3. *Refining.*

The refining process is largely a matter of extracting the maximum amount of gasoline from the crude oil. The normal Mid-Continent crude oil contains from 20 to 30 per cent of free gasoline which, being extremely volatile, can be removed by merely heating the oil to its boiling point and collecting the gasoline vapors in a condenser. This process is known as "distillation" or "skimming".[16] If the refiner has the equipment he can then produce another twenty to thirty per cent of gasoline by the process known as "cracking", which consists of distilling the residue at high temperatures under pressure.[17]

4. *Marketing.*

After being refined, the gasoline may be stored for a time, either at the refinery,[18] or at terminals along the navigable water-courses.[19] Then it is shipped into the consuming territory, either by gasoline pipe-line[20] or in railroad tank-cars holding from eight to ten thousand gallons each.[21] It may go directly to a large consumer who buys in tank-car lots,[22] but it is usually shipped to a "bulk station" or wholesale storage plant which holds from eight thousand to several hundred thousand gallons.[23] Thence it is distributed by tank trucks (usually called "tank-

[16]Beroth, R. 180; Franklin, R. 918, 928; Swensrud, R. 1401-2.
[17]Beroth, R. 179-80, cross, R. 207; Franklin, R. 928-9; Swensrud, R. 1402.
[18]Beroth, R. 206.
[19]Barkdull, cross, R. 873; Swensrud, R. 1421-3.
[20]Beroth, R. 182-3; Hopp, R. 850; Shatford, R. 997-8.
[21]Beroth, R. 183, 185; Shatford, R. 997-8.
[22]Swensrud, R. 1379.
[23]Beroth, R. 185; Peterson, R. 294.

wagons") to farms and commercial consumers[24] and to service stations which sell it to private autoists.[25]

D. Methods of selling gasoline from the refinery.

1. *Sales through the refiners' own outlets.*

As stated above, the major companies own both bulk storage plants which sell gasoline to farmers, commercial consumers, and dealers, and service stations which sell to motorists.[1] Since the advent of chain store legislation, however, they no longer operate many service stations. Instead, they have leased out most of their stations to independent dealers.[2]

2. *Inter-refinery transactions.*

Refiners sell a great deal of gasoline to other refiners. One type of transaction is the so-called "exchange" whereby one company supplies another's bulk plants and customers in areas which the latter cannot conveniently supply, in return for a similar accommodation from the latter.[3] Another is the so-called "processing contract" under which one refiner furnishes crude oil and has it refined into gasoline by another.[4] The most common inter-refinery transactions is the straight inter-refinery sale in which one refinery sells gasoline outright to another. Many of the major companies have to acquire a substantial

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[24]Swensrud, R. 1378-9.

[25]Swensrud, R. 1379-80.

[1]See p. 3, *supra*.

[2]Beroth, R. 177; Marshall, R. 1233; Swensrud, R. 1379-80. In 1935 the defendants sold only 20 per cent of their gasoline through their own service stations (Def. Ex. 1028, R. 3812).

[3]Jacobi, R. 470; Hopp, redirect, R. 853.

[4]Langfitt, R. 1146.

amount of their gasoline in this way. With the exception of Standard of Indiana, they are all relative newcomers[5] and their growth has been paralleled by an amazing increase in the use of automobiles and the consumption of gasoline.[6] Most of them have been engaging in a competitive race for outlets—acquiring large numbers of bulk stations,[7] and filling stations,[8] and signing up jobbers on long-term contracts which obligate them to furnish large quantities of gasoline.[9] At various times, therefore, practically all of the major companies have found their sales outrunning their capacity to manufacture, and they have had to make up the deficiency by purchasing, usually from independent refiners. This was particularly true in the early 1920's.[10] Even in the years from 1931 to 1935, however, most of the defendants were purchasing from other refiners, and at least nine of them were purchasing in substantial quantities.[11]

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[5]In 1911 Standard of Indiana was the only major company in the field, and there was practically no competition (Barkdull, cross, R. 878; Marshall, R. 1245-6). Socony-Vacuum has built up its distributing system in the Middle West entirely since 1911. (Arnott, R. 1685-6). At least three of the defendants—Pure Oil, Mid-Continent, and Skelly—were not even in existence in 1911 (Wescoat, cross, R. 856; Rouzer, R. 842; Hopp, R. 849). Barnsdall was regarded as an independent refiner as recently as 1933 (Franklin, R. 947).

[6]Shatford, R. 996-7, 999; Arnott, R. 1685.

[7]Shatford, R. 999-1000; Marshall, R. 1246.

[8]Arnott, R. 1685.

[9]Shatford, R. 999-1000; Arnott, R. 1685.

[10]Shatford, R. 999.

[11]See pp. 231-40, *infra*.

3. *The open spot tank-car market.*

Open spot tank-car transactions are sales to jobbers and consumers for prompt or immediate shipment.[13] The market is "open" because the sales are not made under long-term contract; each one is the result of individual bargaining. It is a "spot market" because shipment is to be made in the immediate future—that is, within ten or fifteen days.[13]

There is no central exchange or market place for spot market transactions. Each sale is the result of individual bargaining and is made either f.o.b. the refinery or f.o.b. a refinery center like Tulsa or Chicago.[14] Usually the refiner initiates the transaction by telephoning or wiring his customers and offering them a certain number of cars of gasoline at a certain price, on certain terms of freight and delivery. For instance, "We offer you ten cars of gasoline for immediate shipment, subject to prior sale, 4½¢ per gallon, f.o.b. refinery."[15] Or the customer calls the refiner and asks him, "What price can you give me on five cars of 68-70 gasoline for immediate shipment?"[16] In either case, if the purchaser finds the refiner's price acceptable, a sale on the spot market results. The same method

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[13]Beroth, R. 189.

[13]Steiger, R. 731-2. Beroth testified that a spot sale should be for delivery within 48 hours (Beroth, R. 189). Shatford testified that in his own refinery he might have regarded a sale for delivery within thirty days as a spot transaction (Shatford, R. 1004). However, the period mentioned above—ten to fifteen days—is recognized by Platt's Oilgram as representing the prevailing usage (Govt. Ex. 730, R. 3200).

[14]Beroth, R. 189; Steiger, R. 732.

[15]Shatford, R. 1005.

[16]Beroth, R. 189.

is used with large consumers who purchase in tank-car lots.[17]

Sales on the spot tank-car market must be either sales to jobbers or consumers. Sales by one refiner to another are not considered sales on the spot tank-car market, and are not reported in the market journals.[18]

4. *Sales under long-term jobber supply contracts.*

Since 1925[19] the volume of trading on the open spot tank-car market has been shrinking rapidly, particularly in the regular or 68-70 octane bracket.[20] In its place has come the long-term jobber supply contract under which the jobber contracts to buy and the refiner to furnish gasoline for a year or more. From the jobber's standpoint, such contracts have two great advantages: (1) He is assured of a steady supply of gasoline which he can market under the refining company's brand name, thus getting the advantage of the latter's prestige and national advertising;[21] and (2) The contract gives him a wholly or partially guaranteed margin between the price he has to pay for the gasoline and the normal service station price.[22]

These contracts are so attractive that a large number of jobbers have withdrawn their patronage from the spot market.[23] Today the major companies sell about one quar-

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[17]Swensrud, R. 1379.
[18]Steiger, R. 769-70, 773-8.
[19]Shatford, R. 999-1000.
[20]Steiger, R. 737-41, 743-5.
[21]Wingrove, R. 228; Pedley, R. 237; Trainor, R. 240. See also Lanzer, R. 245-6.
[22]Lanzer, R. 245; Shatford, R. 999-1000.
[23]Beroth, R. 204; Shatford, R. 999-1000.

ter of their gasoline under contract and scarcely any on the spot market.[24] Even the independent refiners sell under contract from one-third to one-half of the gasoline which they sell in the Mid-Western area.[25]

It is, of course, impracticable to fix the price which the jobber is to pay over the whole life of such a contract. In most cases, therefore, the contract provides that the jobber shall pay the average price prevailing on the spot tank-car market on the day of shipment as reflected in one or more market journals on that day, with some provision to protect the jobber if the "spread" between his purchase price and the retail market becomes too narrow. During the indictment period, a typical contract[26] would provide as follows:

> "• • • The Buyer shall pay for Seller's regular grade of D-X Motor Fuel the 'spot Market Price' f.o.b. Group 3, Oklahoma, as defined in Clause 6, of 58/60 437-U. S. Motor Gasoline, 63-70 octane number, or said 'Spot Market Price' of the grade furnished, as determined by octane specifications, when such price, plus the cost per gallon of freight transportation from Tulsa, Oklahoma, to point of destination, plus a margin of 5½¢ per gallon, does not exceed the normal officially posted service station price, exclusive of tax, at destination, on date of shipment, of the ..... Company on their ..... or other similar grade of gasoline as the quality of said gasoline is now maintained or may hereafter be improved.
>
> "If, however, such Spot Market Price, plus the said cost per gallon of freight transportation, plus

[24]Def. Ex. 1028, R. 3812; Beroth, R. 189; Steiger, R. 735.
[25]Shatford, R. 1000; Beroth, R. 189.
[26]Govt. Ex. 618 used by Mid-Continent, R. 3031.

the aforesaid margin, exceeds such service station price, then the invoice price of said D-X Motor Fuel shall be reduced by an amount equal to one-half of such excess. The aforesaid margin is based on Seller's present Resellers discount of 3½¢ to Undivided Dealers and Resellers; in the event Seller increases or decreases said Resellers discount to Undivided Dealers and/or Resellers generally throughout its marketing territory, then the aforesaid margin will be increased or decreased an equal or like amount * * *.

* * *

"The 'spot market price' per gallon f.o.b. Group 3, Oklahoma, shall be the average of the minimum and of the maximum prices, or the average of the prices, of gasoline and motor fuel, as published in the Chicago Journal of Commerce, Chicago, Illinois and Platt's Oilgram, Tulsa edition (Oklahoma markets) on the date on which shipment is made * * *."

The wording of the contracts varied, especially in the margin provisions.[27] The use of the spot market quotations as the price basis, however, was very common. Out of 1729 contracts executed by major oil companies in 1935, 1461 or 84.5 per cent had price provisions substantially like that quoted above. A hundred more based the price on the quotations in the Chicago Journal of Commerce alone.[28]

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[27]See the sample jobber contracts and price provisions in the record, Govt. Exs. 618-621, 623-640, R. 3031-80.

[28]W. J. Miller, R. 339-40. Swensrud pointed out that this comparative uniformity is due to the severity of competition, which forces each company to offer as attractive terms as its competitors (Swensrud, R. 1388-9).

E. The market journals—Platt's Oilgram and the Chicago Journal of Commerce.

The prices paid by jobbers and consumers in the various spot markets are published daily in the trade journals, "Platt's Oilgram" and "Chicago Journal of Commerce."[1]

Platt's Oilgram obtains its quotations through a "market-checker" in the Tulsa office.[2] Each day the checker calls from fifteen to thirty-five refiners in the various refinery areas and ascertains the quantity and price of the gasoline which they have sold in spot sales to jobbers. After checking the prices so reported against various other sources of information and taking into consideration the volume of sales reported at each price, he makes up his mind as to the lowest and highest prices at which gasoline is being sold to jobbers in substantial quantities on the spot market. The result is published in the Oilgram that same day. For instance, if substantial sales are reported at 5⅛¢, 5¼¢ and 5⅜¢, the Oilgram reports a price range of 5⅛-5⅜¢.[3]

The Chicago Journal of Commerce publishes similar quotations[4] except that one set of quotations embraces the entire Mid-Continent field,[5] the quotations appear on the day *after* the sales reported therein,[6] and the same quota-

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[1]Beroth, R. 190. See Govt. Ex. 730, R. 3200.

[2]Steiger, R. 728-30.

[3]Steiger, R. 741-2, 745-8; See Govt. Ex. 730, R. 3200.

[4]Beroth, R. 190.

[5]W. J. Miller, R. 352.

[6]W. J. Miller, cross, R. 355. The National Petroleum News, which is owned by the same interests as Platt's Oilgram (Steiger, R. 729; Mosher, R. 789-90), gives the Oilgram quotations in weekly form (Steiger, R. 729).

tions cover not only sales to jobbers but sales to commercial consumers.[7]

Neither Platt's Oilgram nor the Chicago Journal of Commerce publishes quotations showing the prices paid in sales by one refiner to another.[8]

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[7]J. D. Miller, R. 1656.
[8]Beroth, R. 190; Steiger, R. 769-70, 773-8.

II.

The demoralization of the oil industry prior to 1933.

A. The causes of overproduction.

In the early days of the oil industry, it was believed that oil flowed under a man's land like a river or creek.[1] As a result of this misconception, the courts treated oil pools like underground water-courses and laid down the so-called "rule of capture" whereby anyone who drilled a well was entitled to take out as much oil as he could.[2]

Petroleum geologists long ago disproved the theory upon which this rule was based,[3] and established that all the operators in a pool draw from a common source of supply, and that if one withdraws more than his share, he diminishes what is left for the others. But the rule of capture has persisted, and if one operator insists upon producing his wells to capacity, the operators on adjoining tracts must follow suit or else lose a portion of the oil under their lands.[4]

The "race for production" is intensified by the fact that oil leases usually require the lessee to produce at a rate which will prevent the oil from being drained off by the operations on adjoining properties. Even if the lease does not so provide, the courts imply such provisions.[5]

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[1]Franklin, R. 920.
[2]Beroth, R. 206; Franklin, R. 920.
[3]Franklin, R. 919, 920.
[4]Franklin, R. 922, 927.
[5]*Ibid.*

As Franklin testified:

> "• • • There is always somebody in a pool, some owner, some operator, that wants to produce his wells to the limit, and he will continue to produce. • • • if he continues to produce, every owner or operator in the same pool must produce, or lose at least a portion of the oil from under his property. • • • if he fails to produce and protect the property from drainage, his lease is subject to cancellation."[6]

When a new flush field is discovered and a "race for production" occurs, the price of crude oil declines.[7] Unfortunately, however, low prices do not put a stop to over-production. In fact, they tend to accelerate it, for it takes more barrels of cheap crude to pay the producers' operating costs and fixed charges. When the price declines the producers are almost compelled to produce more oil.[8]

B. The growth of overproduction since 1926.

The conditions described above did not affect the oil industry seriously until 1926. Previous periods of overproduction in 1913 and in 1920 had been temporary and insignificant.[1] The principal problem of the industry during the period was to find enough crude oil to supply the growing demand.[2]

In 1926, however, the situation was suddenly reversed. During the next four years some twenty new pools were

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[6]Franklin, R. 927.
[7]Franklin, R. 927-8, 984.
[8]Franklin, R. 927.
[1]Franklin, R. 983-4.
[2]Shatford, R. 996.

discovered in the Seminole area in Oklahoma. At the same time the Yates and Winkler pools and numerous smaller pools were discovered in Texas. In 1928 the great Oklahoma City field came in, producing high grade oil in such quantities that it seriously affected crude oil and gasoline markets throughout the United States.[3]

It was soon realized that overproduction was threatening the interests of the public. The nation's total oil reserves, in known and developed pools, were only thirteen billion barrels—a little more than ten years' supply.[4] With every operator in the new flush fields trying to produce more oil than his neighbor, waste and demoralization were bound to follow.[5] The public was injured in three ways:

1. *Overproduction led to waste.* The independent producers seldom had enough storage capacity to accommodate more than a few days' production.[6] When they produced oil beyond the capacity of the available pipeline facilities, they had to store it in open pits where rains washed it away, the more volatile constituents of the oil evaporated, and large quantities were lost through underground seepage.[7]

2. *Overproduction reduced the productive capacity of the oil fields.* In some cases, the sudden removal of the gas and oil allowed water to reach the foot of the wells and cut off the oil.[8] In others, the gas which forced the oil to the surface, and which should have kept the

[3]Franklin, R. 984.
[4]Franklin, R. 918.
[5]Franklin, R. 922.
[6]Franklin, R. 926.
[7]Franklin, R. 922.
[8]Franklin, R. 921-2.

oil "thin" so that it would move easily through the porous rock, was wasted in the air. Soon the oil became too "dead" or viscous to move, and the pressure declined to the point where the wells would produce, if at all, only by pumping.[9]

3. *Overproduction drove the price down to uneconomic levels.* "The backbone of the industry" consists of some 50,000 pumping and 250,000 stripper wells with a combined production of about 500,000 barrels a day.[10] Flush production is only a temporary condition. Pumping and stripper wells produce over a long period of time with a relatively small decline in production.[11] The cost of production in these wells, however, is much higher than that in flush wells. A flush field like Oklahoma City may produce crude oil for 50 cents a barrel.[12] One like East Texas may produce for as little as 10 cents.[13] Production from pumping and stripper wells, however, costs much more.[14] At one point during the N. R. A. Code period, the Federal Petroleum Administrator signed an order fixing the price of Mid-Continent crude oil at a minimum of $1.11 a barrel, on the ground that that price represented the average cost of production.[15]

If the price of crude oil falls below the cost of production from pumping and stripper wells, such wells must be abandoned. Once they have been abandoned, subsur-

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[9]Franklin, R. 921, 922-3.
[10]Franklin, R. 924-5.
[11]Franklin, R. 924.
[12]Franklin, R. 925-37.
[13]Beroth, R. 208; Shatford, R. 1001-2; Fischer, R. 1116.
[14]Franklin, R. 924, 925.
[15]Franklin, R. 952-3.

face changes make it difficult or impossible to get the wells producing again. Since the pumping and stripper wells constitute over forty per cent of the country's known oil reserves, conservation requires that the price of crude oil be maintained at a level which will permit such wells to continue in operation.[16]

C. The failure of attempts to prevent overproduction—The East Texas oil field.

The oil-producing states of Oklahoma and Kansas first attempted to remedy these evils by passing "conservation" or "proration" laws. These laws were designed to prevent waste by limiting the amount of oil produced in each field.[1] Each state charged one of its commissions with the duty of determining how much crude oil should be produced. Each month this commission would receive "nominations" from the various refiners—*i. e.*, estimates of the amount of crude oil they would be willing to buy, or the amount they would need during the ensuing month. On this basis the commission would set a gross figure representing the total allowable production for the state during the month in question. It would then apportion this total "all vable" among the different pools in the state.[2]

In 1930, just as proration was beginning to work in the Oklahoma City field,[3] the largest oil field in history—

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[16]Franklin, R. 924-5. The nation consumes approximately ten percent of its known resources each year (Franklin, R. 918).

[1]Shatford, R. 1070; Franklin, R. 984.

[2]Swensrud, R. 1394. In Oklahoma the regulatory body was the Oklahoma Corporation Commission; in Kansas, the Conservation Commission; in Texas (when Texas finally passed such a law) it was the Texas Rail-Road Commission. (*Ibid.*)

[3]Franklin, R. 984.

fifty miles long and ten miles wide—was discovered i East Texas.[4]

Most of the field was owned in small tracts by pro ducers who had never been in the oil business before They drilled rapidly, spaced their wells closely together and completed 23,000 producing wells in seven years.[5] It was once estimated that, if left unchecked, these wells could have produced at the rate of 300,000,000 barrels of crude oil a day.[6]

At this time Texas did not have a proration law.[7] The East Texas field proceeded to create a flush production "the like of which has never been known in the history of oil in the United States."[8] The supply of oil from the new field was so excessive that the Oklahoma City field had to be cut down to less than one per cent of its potential production.[9] At one time crude oil sank to 10 or 15 cents a barrel, and gasoline could be bought in the East Texas field for 2⅛ cents a gallon.[10]

D. Hot gasoline.

In 1931 Texas passed a proration law, similar to the Oklahoma and Kansas laws, to be administered by the Texas Railroad Commission.[1] It proved impossible to enforce it.[2] The Railroad Commission issued order after

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[4]Beroth, R. 181; cross, R. 222; Fischer, R. 1114.
[5]Franklin, R. 984; Fischer, R. 1114.
[6]Fischer, R. 1114-5.
[7]Bradshaw, R. 707.
[8]Franklin, R. 984.
[9]Franklin, R 932, 933.
[10]Beroth, R. 208, 222.
[1]Beroth, R. 213; Bradshaw, R. 707.
[2]Bradshaw, R. 707; Franklin, R. 984-5.

order restricting production, but each time, after a short lull, the production would start to increase and would continue to do so until all barriers had broken down.[3] The crude oil, so produced in excess of the Railroad Commission's allowables, became known as "hot oil." The gasoline manufactured therefrom was "hot gasoline."[4]

The inability of the Texas authorities to enforce the state proration laws made it possible for certain refiners in East Texas to obtain hot oil at prices which were substantially lower than those being posted for legal oil. This, in turn, enabled them to manufacture gasoline at a much lower cost than the refiners who were operating on legal crude oil. As a result, they often could sell their gasoline for less than it cost to manufacture it from legal crude oil.[5]

The efforts of the legitimate refiners to meet this competition were futile. Hot gasoline crowded into the market everywhere, depriving legal gasoline of its normal outlets so that it had to be sold at distress prices.[6] Many independent refiners operating on legal crude oil were faced with bankruptcy.[7]

E. Distress gasoline.

Even before 1930 the independent refiners' markets had been contracting so that it had become extremely difficult for them to dispose of their gasoline. Many of the major companies which had formerly bought from independent

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[3]Franklin, R. 984-5.
[4]Shatford, R. 1000.
[5]Shatford, R. 1000, 1001.
[6]Shatford, R. 1002.
[7]Shatford, R. 1001.

refiners increased their own refining capacity until they were relatively self-sufficient. All of them began acquiring customers at the independent refiners' expense. The major companies had superior equipment, and lower transportation costs. They had bulk plants and filling stations which assured them of having an outlet for their products. The independent refiners had none of these advantages.[1] Even the independent refiners' jobbers began to desert them as the majors offered national advertising and guaranteed margin contracts.[2]

When overproduction of crude oil became serious in 1930, the independent refiners were faced with the further problem of an oversupply of gasoline. The independent producers had little or no storage facilities of their own. When they became involved in the race for production, they had to sell their oil as fast as they produced it.[3]

Crude oil is generally sold under a contract called a "division order" whereby the purchaser binds himself to take all the allowable oil produced on the lease as fast as it comes out of the ground.[4] Unfortunately the independent refiners who entered into these contracts had as little storage capacity as the producers from whom they bought.[5] At the same time, they could not afford to shut down unless they expected to go out of business permanently. If they do so, they would have lost both their

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[1]Shatford, R. 997, 999.

[2]Shatford, R. 999-1000; Wingrove, R. 228; Lanzer, R. 245-6; Pedley, R. 237.

[3]Franklin, R. 926, 927.

[4]Franklin, R. 926.

[5]Frankin, R. 929-30.

oil connections in this field,[6] and their regular customers.[7] The refiners therefore had to buy all the oil produced by their producers and keep their refineries running whether they were making money or not.[8]

Once the gasoline had been manufactured, the independent refiners were faced with another problem which resulted from the restricted character of their operations. Having no storage capacity, they had to sell their gasoline on the spot market as fast as they made it.[9] As a result, the independent refiners' gasoline became "distress" or "surplus" gasoline—that is, gasoline which could be neither stored nor sold at the market price, but which had to be disposed of in some way. Inevitably such gasoline was dumped on the market for whatever price it would bring.[10] Such sales inevitably drove the market down until no independent refiner could make a profit.[11]

A complete summary of the record references to distress gasoline will be found in Part VI, pp. 192 to 215, *infra*.

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[6]Franklin, R. 930; Gray, R. 1827, 1828; Shatford, R. 1003.

[7]Franklin, R. 930; Gray, R. 1828.

[8]Franklin, R. 930.

[9]Franklin, R. 929-30; Shatford, R. 1003, 1010; McDowell, R. 1166.

[10]Jacobi, R. 385-6; Cline, R. 642; Bradshaw, R. 671; Steiger, R. 751-2; Franklin, R. 929; Shatford, R. 1003; McDowell, R. 1166; Frey, R. 1327.

[11]Shatford, R. 1003.

III.

Efforts to rehabilitate the industry from March, 1933 to January, 1935.

A. Generally.

In the spring of 1933 the demoralization of the oil industry reached a climax. The competition of hot gasoline had driven the price on the wholesale market down below the cost of manufacture.[1] Even the major companies could no longer afford to supply their jobbers at the prevailing prices. At first they held their products in storage until they built up excessive inventories. Then, as the market became saturated with cheap gasoline, they became afraid to hold their inventories and, like the independent refiners, they began dumping gasoline on the markets. "Everybody was trying to get on the market at once," dumping gasoline wherever it could be sold at any price it would bring.[2] As a result, the price of crude oil on June 1, 1933, nearly three years after the discovery of the East Texas field, was only 25 cents a barrel. The tank-car price of regular gasoline was 2⅝ cents a gallon.[3]

At this point the Federal Government joined with the industry in an attempt to improve conditions under the National Industrial Recovery Act.

Certain features of this attempt were common to all industries at the time. There was an N. R. A. Code of Fair Competition, proposed by the industry, examined by Gen-

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[1]Shatford, R. 1001.
[2]Shatford, R. 1001, 1002, 1003, 1005-6.
[3]Def. Ex. 978, R. 3718.

eral Johnson, and approved by President Roosevelt.[4] There was an attempt, under that Code, to regulate wages, hours, and conditions of labor[5] and competitive practices[6] throughout the industry. There was an industry Code authority—the "Planning and Co-ordination Committee"[7]—which functioned, partly as an administrative[8] and partly as a compliance[9] agency throughout the Code period.

The efforts toward rehabilitation of the oil industry, however, had four unique features which will be described in the four sub-sections which follow.

1. *A special provision regulating the oil industry was incorporated in Section 9(c) of the N. I. R. A. which authorized the President to forbid the interstate shipment of hot oil and hot gasoline.*

Section 9(c) of the National Industrial Recovery Act[10] authorized the President to prohibit, on penalty of fine or imprisonment,

> "• • • the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn

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[4]Def. Ex. 710 for identification, R. 3141; Franklin, R. 915-6; McDowell, R. 1164; Arnott, R. 1686-7.

[5]Collett, R. 1805.

[6]Arnott, R. 1688; Collett, R. 1805.

[7]Franklin R. 915, 946, 948; Moffett, R. 1149; McDowell, R. 1164; Arnott, R. 1687, 1715; Collett, R. 1801, 1804.

[8]Franklin, R. 945, 948; Arnott, R. 1687.

[9]Arnott, R. 1688; Collett, R. 1805.

[10]48 Stat. 195. 200, Sec. 9(c).

> from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State. * * *"

On July 11, 1933,[11] President Roosevelt exercised his authority under this section by issuing an Executive Order which forbade the interstate shipment of hot oil and hot gasoline. A short time later, regulations were issued to make this order effective.[12]

2. *Section 9(c) and the Code were enforced, not by the National Recovery Administration but by a "Federal Petroleum Administration" in the Department of the Interior under Secretary Ickes.*

(a) The Administrator.

On July 14, 1933, President Roosevelt turned the administration of Section 9(c) of the N. I. R. A. over to Secretary Ickes by authorizing him,

> "* * * to exercise all the powers vested in me, for the purpose of enforcing Section 9(c) of said act and said order, [of July 11th], including full authority to designate and appoint such agents and to set up such boards and agencies as he may see fit, and to promulgate such rules and regulations as he may deem necessary."[13]

This order disposed of the administration of Section 9(c), but did not affect the Code. In the ordinary course of

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[11]Def. Ex. 974, R. 3696, 3697.
[12]Beroth, cross, R. 222; Fischer offer, R. 1123.
[13]Def. Ex. 974, R. 3696, 3697.

events, the latter would have been administered by the National Recovery Administration. The Department of Interior, however, was the Government's principal agency for conservation,[14] and, on August 28, 1933, President Roosevelt consolidated all authority over the oil industry in that department by designating and appointing,

> "* * * the Secretary of the Interior to be Administrator and the Department of the Interior to be the Federal agency, as provided by the aforesaid act and Code of Fair Competition, to exercise on my behalf and in my stead all the functions and powers vested in me, or in any Federal agency, by such act and such Code of Fair Competition."[15]

(b) The Petroleum Administrative Board.

On September 11, 1933, Secretary Ickes issued an executive order[16] establishing,

> "* * * a Board to be known as the Petroleum Administrative Board of the Department of the Interior, the functions of which shall be to advise with and make recommendations to the Secretary of the Interior as the Administrator of the Code of Fair Competition for the Petroleum Industry. * * * Said Board shall also perform such administrative functions as may be detailed to it by the Secretary of the Interior, * * *"

During the indictment period the Board was composed of five members: Charles Fahy (Chairman), N. L. Meyers, J. H. Marshall, E. B. Swanson, and J. W. Frey.[17] In ac-

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[14]Franklin, R. 945.
[15]Def. Ex. 974, R. 3696, 3697.
[16]Def. Ex. 974, R. 3696, 3698.
[17]Shatford, R. 1023.

tual practice it enjoyed considerably more authority than the above-quoted order would indicate. The "job allocation sheets," approved by Secretary Ickes, designated the Chairman of the Board as the "Deputy Administrator of the oil industry."[18] Each member was given "unusual latitude for independent and unreviewed administrative and executive action and decision," and each was put directly in charge of one phase of the Board's activities.[19] Dr. Frey testified that:

> "• • • Mr. Swanson was a member in charge of the Production and Refining Division. I was the member in charge of the Marketing Division. • • •
>
> "The functions of the Petroleum Administrative Board with respect to marketing were to carry out the purposes of Article V of the Code of Fair Competition for the Petroleum Industry. • • •
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> "The Board was normally not conducted as a solid group; it was rather departmentalized. We had a group of men who were in law; Mr. Marshall, Mr. Meyers, Mr. Fahy, and Mr. Margold were lawyers; Mr. Swanson gave his attention to production and refining; and I gave mine to marketing. We rarely met as a Board. We usually reported what was happening in our particular field to the chairman of the Board. If he felt it was necessary for all of us to get together, he called a meeting; but normally we operated independently, each more or less in his own division. Insofar as I could solve any problems that had to do with marketing, I did that myself. If necessary, I called in help.[20]

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[18]Def. Ex. 988, R. 3735.
[19]Def. Ex. 974, R. 3696, 3703, *et seq.*; Frey, R. 1265.
[20]Frey, R. 1265.

"Our contact was very informal with the industry in carrying on the work of the P. A. B. We had frequent occasion to arrange various things with them, controversies of one type or another would develop, and in just a few minutes we might rush into a particular situation. The period was extremely hectic. We didn't have time to sit down and assemble the Board formally to deal with every detail. Every fellow was out to do as much as he could to restore the industry to normal.

"Sometimes it was necessary to meet with members of the P. & C. Committee in Washington, in Chicago, in Detroit, in New York, wherever it happened to be convenient. All of us were at these meetings in very few instances.

"We were sort of a buffer between the committee of the industry, that is, the Planning and Coordination Committee, and the Administrator of the Code, the Secretary of the Interior. Very frequently all preliminary negotiations were carried out in that informal way; and in some instances they were formalized by an order of the Secretary; in other instances, they were not."[21]

3. *The Government and the industry attempted not only to regulate competitive practices, but to balance the basic factors of supply and demand.*

The respondents offered to prove certain important facts regarding the Petroleum Administration's efforts to balance supply and demand. All of this evidence was excluded. It appeared incidentally, however, from the testi-

[21]Frey, R. 1273. See also, Shatford, R. 1012, 1015, 1058; Arnott, R. 1698-9.

mony of respondent's w nesses that under the Code the United States Bureau of Mines estimated the future demand for crude oil and divided the total among the oil-producing states,[22] and that most of the latter thereafter followed the Bureau's recommendations in establishing their state "allowables";[23] that the Government limited the daily imports of crude oil and gasoline,[24] and withdrawals of crude oil from storage;[25] and that the Planning and Coordination Committee and its subcommittees regulated refinery operations,[26] and gasoline inventories.[27]

[*The respondents offered* the Code Sections in question in evidence. They will be found in Defense Exhibit 710 for identification.[28]

[*The respondents also offered to prove* that under the provisions of Article V, Section 31, any violation of these restfictions was an act of unfair competition and a violation of the Code.[29]]

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[22]Shatford, R. 1002-3; Fischer, R. 1115.

[23]Shatford, R. 1003.

[24]Franklin, R. 986.

[25]Franklin, R. 986-7; Shatford, R. 1003.

[26]Shatford, R. 1001, 1006-7.

[27]Shatford, R. 1010.

[28]R. 3141, 3148-51. The provisions appear as follows: Restrictions on production—Article III, Sections 3-5, inclusive; restrictions on imports—Article III, Section 1; restrictions on the withdrawal of crude oil from storage—Article III, Section 2; restrictions on refinery operations—Article IV, Sections 1 and 2; restrictions on gasoline inventories—Article IV, Section 4.

[29]Def. Ex. 710 for identification, R. 3141.

4. *The Government and the industry attempted to maintain a definite relationship or "parity" between the price of crude oil and gasoline.*

It appeared incidentally from the testimony of respondent's witnesses that "Section 6 of Article 3 of the Code provided that crude oil should be eighteen and a half times the (tank-car) price of gasoline,"[80] that Rule 4 of Article V "provided against selling any product at less than cost,"[81] and that "the Petroleum Code gave us the legal option to direct the price and name the price at which the retailer would sell."[82]

[*The respondents offered* these Code sections and other similar Code sections in evidence and offered to show the background of these sections.

[The offered proof would have shown that the problem of price was one of the first to be called to the attention of the Roosevelt Administration. On March 8, 1933, James A. Moffett had called upon President Roosevelt, as spokesman for the American Petroleum Institute, and laid the problems of the industry before him. At that time the President expressed the opinion that the price of crude oil (then 44 cents a barrel) should be raised to one dollar a barrel, and sent Moffett to see Secretary Ickes.[83] Subsequently, and apparently as a result of these conferences,[84] Secretary Ickes called a conference of the Governors of the oil-producing states at Washington on March 27-29,

[80]McDowell, R. 1181.
[81]McDowell, R. 1212.
[82]McDowell, R. 1175.
[83]Moffett offer, R. 1150-1.
[84]Moffett offer, R. 1152.

1933. At this conference a committee, composed of representatives of the oil-state Governors and the industry prepared a set of recommendations, many of which were incorporated in Section 9(c) of the N. I. R. A. and in the Petroleum Code. These recommendations concluded with a statement that:

> ["If the foregoing conservation program is to succeed, the committees respectfully submit that it must be based on a price for crude oil which will allow a margin of profit to the producer and a price for the refined products which will allow a margin of profit for the refinery and the retail dealer."

[Upon the submission of these recommendations on March 29th, Secretary Ickes agreed with the committee "that there could not be conservation of our oil resources, proration of production and limitation of imports into this country without adequate prices for crude oil sufficiently high to cover the cost of production on the stripper well areas of the United States."[35]

[Subsequently, the N. R. A. Petroleum Code contained the following provisions dealing with the prices of petroleum and its products:[36]

> ["During such periods as the production of crude petroleum in any State is within the allocation to that State, as provided in Section 3, Article III, of this code, *it shall be an unfair practice within that State to buy, sell, receive in exchange, or otherwise acquire Mid-Continent crude petroleum of 36°-36.9° A. P. I. gravity during any*

[35]Franklin offer, R. 963, 970-974.
[36]Def. Ex. 710 for identification, R. 3141.

calendar month at a price per barrel (to the nearest cent) less than that which will be determined by multiplying the average Group 3 tank-car price per gallon of U. S. Motor gasoline of 60-64 octane rating during the preceding calendar month as ascertained and declared by the Federal agency designated by the President, by the constant 18.5. The constant 18.5 represents the relationship, during the period 1928-1932, between the average price per barrel of Mid-Continent crude petroleum of 36°-36.9° A. P. I. gravity and the average Group 3 price per gallon of U. S. Motor gasoline of 57-65 octane rating or 58-60 U. S. Motor gasoline. * * * " (Art. III, Sec. 6. Italics supplied.)

["For a test period of not to exceed ninety days, the President may prescribe the base price of the gasoline described in Section 6 of this Article to which said constant shall be applied and, at the end of said period the President may revise the formula set forth in said Section 6 or add such additional formulae relative to the wholesaling and retailing of petroleum and its products in such manner as in his opinion may be necessary to effectuate the purposes of the National Industrial Recovery Act. If and whenever the President shall prescribe a base price for gasoline then it shall be an unfair trade practice to buy, sell, give or receive in exchange or otherwise dispose of or acquire such gasoline at a lower price." (Art. III, Sec. 6(a).)

* * *

["Refiners, distributors, jobbers, wholesalers, retailers, and others engaged in the sale of petroleum shall not sell any such refined petroleum products below cost of manufacturing or importation into the State where offered for sale, plus reason-

able expenses in the cost of marketing as observed under prudent management, fixed taxes and inspection fees by the Federal or State Government, or any political subdivision thereof, provided, however, that any person is permitted to meet competition in violation of this rule concerning which he has made complaint to the Planning and Coordination Committee, or any authorized agency thereof, but only pending action thereon. * * *" (Art. V, Rule 4.)

* * *

["Inasmuch as there are firms and corporations in the petroleum industry who severally or through firms and corporations owned or controlled, constitute and comprise a complete or integrated unit in such industry or produce and refine petroleum and market the products manufactured therefrom, the business thereof shall be so conducted that the several branches of this industry, viz: producing of petroleum, refining, and marketing of refined products may be carried on upon a profitable basis and that no one or more of the said branches shall obtain or receive excessive or disproportionate gain or profit therefrom to the exclusion of any other branch of this industry." (Art. V, Rule 6.)

* * *

["In all sales of trade-marked or branded petroleum products for resale, refiners, distributors, jobbers, or wholesalers may, by contract, require purchasers to sell at prices therein designated for such resale; and may further require that if such products are thereafter sold by such purchaser for resale, that the original purchaser shall incorporate a similar provision in the contract with its purchaser for resale." (Art. V, Rule 26.)]

B. The objectives of the Federal Petroleum Administration.

President Roosevelt approved the N. I. R. A. on June 16, 1933,[1] exercised his authority under Section 9(c) thereof on July 11,[2] and approved the Code on August 19.[3] The Code went into effect on September 2,[4] and Secretary Ickes established the Petroleum Administrative Board on September 11th.[5] During this period there was a marked improvement in the price structure of the industry. Between June 1 and September 15, 1933 the average retail gasoline price for 60-64 octane gasoline rose from 10⅞ cents to 14½ cents per gallon, the tank-car price for the same grade rose from 2⅝ cents to 5⅜ cents, and the price of 36° gravity Mid-Continent crude oil rose from 25 cents to 89 cents a barrel. Referring to these gains in a speech before the Planning and Coordination Committee on September 18, 1933,[6] Secretary Ickes defined the aims of the Federal Government as follows:

> "• • • Your problem is to hold and consolidate this improvement so far as it is justified while paving the way for further improvement.
>
> "I ask you to remember that our primary purpose is to put men back to work and to raise wages, thus enlarging the purchasing power of the industry. • • •
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> • • •

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[1] 40 Stat. 195.
[2] See Def. Ex. 974, R. 3696.
[3] Arnott, R. 1687.
[4] *Ibid.*
[5] Def. Ex. 974, R. 3696.
[6] Def. Ex. 978, R. 3718, 3720.

> "Gentlemen, we have a solemn duty to perform. Our task is to stabilize the oil industry upon a profitable basis. That is the keen desire of the Administration and we will work with you constantly to that end. • • • "

The attempts of the Federal Government to stabilize the oil industry and to assist the states in conserving the nation's petroleum resources, led to the pursuit of three principal objectives:

> (1) The restoration of the price of crude oil to a minimum of $1.00 per barrel. That was the minimum price at which the vast majority of the crude oil wells of the country could operate.[6a]

> (2) The restoration of the wholesale price level of gasoline at the refinery to "parity" with crude oil; that is, to a price which would reflect the normal relation between the price of gasoline and the price of the crude oil from which it is manufactured.[6b]

> (3) The stabilization of retail prices at a normal spread or margin between the refinery price of gasoline and the retail prices.[6c]

We shall discuss these in the three sections which follow.

[6a] See pp. 37-8, *infra*.
[6b] See pp. 38-61, *infra*.
[6c] See pp. 61-70, *infra*.

C. The achievement and maintenance of a price of one dollar a barrel for crude oil.

The admitted evidence merely showed that on September 29, 1933 the price of crude oil rose to one dollar a barrel.[7]

[*The respondents offered to show* ~~that~~ shortly after September 6th (when the price of crude oil had reached seventy-four cents a barrel), Wirt Franklin, the chairman of the Planning and Coordination Committee, had certain discussions with Secretary Ickes from which it appeared that the latter was in favor of a rise in crude oil. Franklin, speaking on behalf of his Committee, told the Secretary that in order to attain the objectives of the Code and to stabilize the petroleum industry, the price for 36-gravity Mid-Continent crude oil should be $1.11 a barrel. The Secretary agreed that the price should equal the average cost of production, but thought that the minimum price should be one dollar a barrel. On Franklin's advice he agreed to take the matter up with the executives of the major oil companies and see if they would raise their posted prices. A few days later he notified Franklin that he had done so.[8]

[On September 8th the price of crude oil was increased to eighty-nine cents a barrel. On September 29, 1933 it was increased to a dollar a barrel, where it was to remain throughout the remainder of 1933 and throughout 1934 and 1935.[9]]

Franklin was allowed to testify that after the price of crude oil reached one dollar a barrel on September 29,

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[7]Franklin, R. 952, 953.
[8]Franklin offer, R. 958-9.
[9]Franklin offer, R. 958.

1933, it was maintained at that level throughout the Code period at the insistence of Secretary Ickes.[10]

[*The respondents offered to prove* that Franklin, as chairman of the Planning and Coordination Committee, had several discussions with the Secretary in which the latter indicated that he did not want the price of crude oil to fall below a dollar.

[*The respondents also offered to prove* that in October 1934, when several independent refiners threatened to cut the price of crude oil below a dollar, the Secretary declared that the reduction "must not take place," sent a personal telegram to the independent refiners urging them to "make no reduction at this crucial time and thus hinder effectuation constructive plans," and dispatched his administrative assistant, Ralph Horween, to Chicago to prevent the reduction.[11]]

D. Attempts to achieve parity between the prices of crude oil and gasoline.

As shown above the Code provided that the price of a barrel of crude oil should be 18.5 times the price of a gallon of 60-64 octane gasoline.[11a]

From the outset, however, the Administration took the position that not only the price of crude oil but the price of gasoline should conform to this ratio. In other words, it attempted to secure, not only a price for crude oil which would be 18.5 times the price of a gallon of gasoline, but

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[10]Franklin, R. 951, 953.

[11]Franklin offer, R. 938-41, 943.

[11a]See p. 33 above.

a price for gasoline which would be 1/18.5 of the price of a barrel of crude oil.[11b]

The reason for this policy becomes apparent when we consider the effect which the establishment of a price of $1.00 a barrel for crude oil had on the independent refiners.

With the price of crude oil at one dollar, the price of 60-64 octane gasoline, according to Section 6 of Article II of the Code, should have been 5.45 or about 5½ cents a gallon.[12] With crude at a dollar it was costing the average independent refiner in the Mid-Continent 5 cents a gallon or more to make third grade gasoline.[13] If supply and demand had been balanced and all refiners had been using legal crude, therefore, the price of gasoline would almost certainly have risen to parity.[14]

Unfortunately, however, supply and demand were not balanced, and all refiners were not paying a dollar a barrel for crude oil. The Government agencies which were trying to enforce Section 9(c) of the N. I. R. A. became involved

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[11b]Arnott, R. 1728-9. [Express statements of the administration's policy are found in Secretary Ickes' price fixing order of October 16, 1933 (Def. Ex. 929 for identification, R. 3327, 3328), which fixed the price of 50-60 octane gasoline at 18.5 of the price of a barrel of crude oil, and in the National Petroleum Agency agreement (Def. Ex. 832 for identification, R. 3332), which expressly provided that the price of 60-64 gasoline should be 1/18.5 of the price of a barrel of crude oil (see p. 44, *infra*).]

[12]McDowell, R. 1181.

[13]Franklin, R. 935. [The record also shows that it cost the average Mid-Continent independent refiner 5.6c. to manufacture regular gasoline (Swensrud offer, R. 1430).] In 1935 it cost the average East Texas refiner between 4½ and 4⅝ cents a gallon to manufacture third grade gasoline. (Govt. Ex. 19, R. 2621, 2622.) Scarcely any of them manufactured regular. (Cline, R. 626.)

[14]*Cf.* Shatford, R. 1064.

in a flood of litigation, and the enforcement of the regulations was enjoined.[15]

During this period the East Texas field over-produced nearly as much as it had before the passage of the N. I. R. A. In 1933 the Texas Railroad Commission was trying to hold the field down to three hundred and fifty or four hundred thousand barrels a day. In 1934 it was trying to hold it down to four hundred thousand. During both years, however, the field was producing from one hundred and fifty thousand to two hundred thousand barrels a day more than the Commission's allowables.[16]

As usual, this hot oil sold substantially below the price of legal crude. From September 1933 through the year 1934, while legal crude was selling for a dollar, the top price for hot oil was thirty-five cents a barrel. Some of it sold as low as ten.[17]

The hot oil refiners could afford to sell gasoline for as little as two or two and one-half cents.[18] They shipped it into interstate commerce in competition with legal gasoline, and captured business from both major companies and independents.[19] As a result, the price of legal gasoline had to meet the price set by the hot oil refiner.[20] By the end of 1933 the price of 60-64 gasoline had fallen below five cents a gallon on the spot market. It remained below five cents throughout 1934, with occasional drops as low as four cents.[21] Indeed, in October, 1934, the Chicago Journal

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[15]Beroth, cross, R. 222.
[16]Fischer, R. 1115-6.
[17]Shatford, R. 1001, 1002; Fischer, R. 1116-7; Beroth, R. 222.
[18]Shatford, R. 1002.
[19]Fischer R. 1117; McDowell, R. 1165, 1166.
[20]Shatford, R. 1001.
[21]Govt. Ex. 671, R. 3089; *cf.* Lanzer, R. 269.

of Commerce's low quotation for gasoline of less than 62 octane rating fell off to 2½ cents a gallon.[22] As a result, the amount of distress gasoline on the market increased substantially,[23] and many independent refiners either went bankrupt or closed down.[24] As McDowell said:

> " • • • The independent refiner • • • was caught between the price of crude oil, which was pegged at $1.00 a barrel, and the competition in the market of gasoline made from hot oil from East Texas, which was put on the market at prices 1½¢ or 2¢ under the price for which any refiner operating on legal market price crude could afford to sell it. This had been going on for months, with very short intervals of improvement; so that many independent refiners had either gone broke or were closed down. The independent refiner just couldn't get enough money out of his gasoline to pay for his crude. The independent refiner had to pay $1.00 for crude, and he wasn't getting $1.00 out of the products that he made from that barrel of crude.'"[25]

The independent refiners' attempts to escape from this predicament constituted a serious threat to the crude oil price level of $1.00 per barrel which was being maintained at the insistence of Secretary Ickes, and which he considered essential to the preservation of the nation's petroleum resources.[26] For, being unable to obtain a price for their

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[22]Def. Ex. 849 for identification, R. 3397.
[23]McDowell, R. 1166.
[24]McDowell, R. 1165.
[25]*Ibid.*
[26]See p. *supra.*

gasoline which would be in parity with $1.00 crude oil, the refiners threatened repeatedly to reduce the price of crude oil to parity with the price of gasoline.[27]

The Administration wanted to help the independent refiners.[28] At the same time, however, it was unalterably opposed to cutting the price of crude oil.[29] During the next year and a half, therefore, Secretary Ickes, the Petroleum Administrative Board and the Planning and Coordination Committee made one attempt after another, either to raise the price of gasoline by direct action, or to eliminate the factors which were keeping it out of parity with the price of crude oil, *i.e.*, hot oil and distress gasoline.

1. *The Price-Fixing Order of October 16, 1933, and the National Petroleum Agency Agreement.*

When crude oil reached a dollar on September 29th, Secretary Ickes was considering a schedule of minimum prices, based upon costs, which had been prepared by the Planning and Coordination Committee.[1] On October 16th, he signed an order approving the Committee's recommendations and ordering them to be made effective, after hearings, on December 1st.[2]

[*The respondents offered to prove* that this order would have fixed the price of 36° gravity Mid-Continent crude

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[27]We have already seen one instance of this in the attempt which the independent refiners made to cut the price of crude oil in October, 1934 (see p. 38, *supra*). Another threat to the same effect was at the General Stabilization meeting on January 4, 1935, described at pp. 78-9, *infra*.

[28]McDowell, R. 1181.

[29]Franklin, R. 951, 953.

[1]Franklin, R. 952, 953.

[2]Franklin, R. 952-4.

oil at $1.11 a barrel, the price of *50-60 octane* gasoline at 1/18.5 of that figure, or 6¢ a gallon, and the price of 60-64 octane gasoline at 6½ cents a gallon.[3]

[*The respondents also offered to prove* that the order was signed as the result of two conferences between Secretary Ickes, members of the Petroleum Administrative Board, members of the Planning and Coordination Committee, and President Roosevelt. In the course of these conferences, the President decided that minimum price-fixing on a cost-recovery basis was necessary to maintain the price of crude oil at one dollar a barrel.[4]]

Many elements in the industry (including most of the major companies[5]) opposed the fixing of prices by the Government. They approached the Planning and Coordination Committee and Secretary Ickes and suggested a substitute plan. Finally, the Committee, the Secretary, and the anti-price-fixers agreed to see if such a substitute could be worked out.[6]

The substitute plan was called a "Petroleum Agency Agreement." It did not fix prices, but it assumed that the price of crude oil would be maintained at a dollar and provided that certain things should be done to maintain the price of gasoline *in normal relationship to* dollar crude.[7]

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[3]Def. Ex. 829 for identification, R. 3327, 3328.

[4]Moffett offers, R. 1153, 1156-7.

[5]Franklin, R. 952-3.

[6]Franklin, R. 953. While these negotiations were under way, Secretary Ickes extended the effective date of the price-fixing order first to January 1, 1934, and then to February 1, 1934. (*Ibid.*)

[7]Franklin, R. 954.

[*The respondents offered to show* that under this agreement[8] twenty-three of the larger oil companies (including all of the corporate respondents, except Globe) agreed to form a group to be known as the National Petroleum Agency, and to subscribe sums aggregating $10,000,000 to achieve its purposes. Those purposes, as set forth in the agreement, were:

> ["• • • to purchase, hold and, in an orderly way, dispose of surplus gasoline which threatens the stability of the oil price structure in an effort to bring the prices of gasoline into proper relationship with the present price of crude oil. • • •"

[The agreement went on to state that:

> ["• • • For the purposes of this agreement the proper relationship between Mid-Continent crude of 36°-36.9 A. P. I. gravity and U. S. motor gasoline of 60-64 octane rating, f. o. b. Group 3 in tank car lots, is that stated in Section 6 of Article III of the aforesaid Code. • • •"

[The members of the Agency further pledged themselves to cooperate with the Code authorities in enforcing and observing the Code and "in working toward a stabilization of markets by adequate action designed to prevent improper and injurious marketing practices."

[The Agency agreement was accompanied by a "National Marketing Agreement" which, it was contemplated, would be signed by refiners having 85 per cent of the refining capacity of the country, and which was to regulate marketing practices, including the margins allowed to dealers and jobbers.[9]]

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[8]Def. Ex. 832 for identification, R. 3332.
[9]*Ibid.*

On January 19th, Secretary Ickes approved [illegible]h agreements with certain modifications. A few days later he revoked the order fixing minimum prices.[10]

The Secretary's modification made it necessary to re-submit the agreements to the industry. On April 25th, 1934, the Planning and Coordination Committee again approved the Agency agreement, and it was re-signed and sent to the Secretary for approval. The latter forwarded it to the Department of Justice which held it under advisement for several months, neither approving nor disapproving. Finally, some of the signers withdrew their signatures, and it became impossible for the agreement ever to become effective.[11]

2. *The Refinery Amendment to the Code.*

The next attempt to help the independent refiners came in the form of an amendment to the refining section of the Code.[12] The original Code system of allocating refinery quotas to the various refinery districts had proved wholly ineffective in controlling inventories.[13] In fact, the situation had grown steadily worse because of the production of crude oil in excess of state allowables.[14]

The new amendment imposed refinery quotas, not upon the refinery districts, but upon the individual refiners themselves.[15] Each month, the Petroleum Administrative

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[10]Franklin, R. 953-4.
[11]Franklin, R. 954.
[12]Def. Ex. 835, R. 3347.
[13]Shatford, R. 1001, 1007.
[14]Shatford, R. 1002-3.
[15]Shatford, R. 1006-7

Board, with the assistance of the Bureau of Mines, would estimate the quantity of gasoline that would be needed to meet consumptive demand during the next month,[16] and the estimate would be submitted to Secretary Ickes for approval.[17] The National Coordinator, the industry's chief administrative authority under the system,[18] would then meet with representatives of the various refinery districts and divide the national allowable among them according to certain rules and regulations.[19] When Secretary Ickes had approved the division of the national allowable among the districts,[20] each district representative would divide up his district's allowable among the individual refiners, according to certain pre-established rules.[21] Each refiner's share was called a "manufacturing quota", and represented the maximum quantity of gasoline that he would be allowed to make during the month in question.[22]

In addition to control of refinery runs and inventories, the new amendment provided a method whereby the major

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[16]Shatford, R. 1008, 1015.

[17]Shatford, R. 1022, 1023.

[18]Shatford, R. 1009.

[19]Shatford, R. 1008, 1015, 1074; Franklin, R. 945, 948, 949-50; Arnott, R. 1718-9; Collett, R. 1804-5.

[20]Shatford, R. 1025; Franklin, R. 945.

[21]Shatford, R. 1008-9. In fixing each refiner's manufacturing quota, consideration was given to the quantity of gasoline which that refiner had been accustomed to shipping, the quantity of gasoline that he needed to store above what he would ship, and the quantity that he would need to take out of storage to supplement his current manufacture in those parts of the year when demand was greater than supply. (*Ibid.*)

[22]Shatford, R. 1008, 1074; Franklin, R. 949-50. If a refiner were dissatisfied with his allocation, he could appeal, first to a "Board of Review" consisting of five members of the industry, then to the Planning and Coordination Committee, and finally to the Administrator, Secretary Ickes. (Shatford, R. 1009.)

integrated companies might assist the independent refiners in getting rid of their distress gasoline. Section 6 of the amendment[23] provided as follows:

> "In order that the provisions of this article may not operate in such manner as to discriminate against small refining enterprises and in order to assist in orderly liquidation of excessive gasoline inventories, the Planning and Coordination Committee may, with the approval of the President, authorize suitable arrangements for the purchase of gasoline from non-integrated and/or semi-integrated refiners and the resale of the same through orderly channels."

[*The respondents offered to prove* that the purpose of this amendment was to reduce the inventories of the major companies so that they would be forced to purchase gasoline from independent refiners. John E. Shatford, who had originally proposed the amendment, discussed this purpose with the members of the Petroleum Administrative Board in February, 1934, and the latter agreed with him that it was necessary to adjust gasoline manufacturing schedules so as to create more active trading in the industry.[24] The objective was pointed out repeatedly during the formal hearings before the Petroleum Administrative Board.[25] At the conferences which finally redrafted the amendment, Shatford, and other sponsors thereof, again pointed out that it was necessary to adjust the major companies' manufacturing schedules so as to open a market for the small refiner, and the amendment was

[23]Def. Ex. 835, R. 3347, 3350.
[24]Shatford offer, R. 1038-40.
[25]Shatford offer, R. 1040.

redrafted with that understanding. This was the objective adopted by the Petroleum Administrative Board at the hearings.[26]

[*The respondents also offered* the following Press Release of the Department of the Interior describing the purpose of the amendment:[27]

> ["'The collapse of the wholesale gasoline structure and consequent collapse of the crude oil market is threatened by an excessive surplus of gasoline and heavy over-production,' Administrator Ickes said. 'This condition must be quickly remedied.'
>
> ["As drafted, the plan would be a complete substitute for the refining article of the Oil Code. It proposes that gasoline production and stocks be regulated strictly to keep the supply balanced with demand, and vests the industry with control of agencies established to achieve this aim, subject to the approval of the Oil Administrator.
>
> ["The plan also provides for making the proposed gasoline purchase or pooling agreement a part of the Oil Code. This agreement, submitted to Administrator Ickes several weeks ago, provides for the creation of a stabilization pool to buy and hold 'distress' or surplus gasoline. The operation of the pool would be kept under the closest scrutiny of the Oil Administrator, and participants in the pool would agree to keep their own surplus gasoline off the market themselves. It is designed to assure to the small, independent refiner who, in most instances lacks outlets for his production, a market for his gasoline at a fair price."]

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[26]Shatford offer, R. 1040-1.

[27]Def. Ex. 848 for identification, R. 3389.

As a result of the new refinery control system, the country's gasoline inventories were reduced to about 53,900,000 barrels on January 1, 1935.[28] Practically all of this reduction was made at the expense of twenty-five so-called "major companies," including the respondents and the former defendants in this case.[29]

This reduction in major company inventories did not occur by accident. During the first year under the amendment, most of the National Coordinator's duties were performed by the Alternate National Coordinator, John E. Shatford, the independent refiner who had proposed the amendment in the first place.[30] Shatford followed a conscious policy of trying to get the major company inventories as low as possible in order to create a firm market,[31] and to force them to increase their purchases from independent refiners.[32] Whenever a District Allocator came to him with a complaint from a major company he suggested that the complainant should make up its deficiencies by going out in the market and buying gasoline.[33] Whenever a major company asked him for a larger quota, he urged it to buy gasoline. He also did other things to accomplish the same purpose indirectly.[34] As a result, many major companies bought gasoline, usually from independent refiners.[35]

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[28]Shatford, R. 1010.

[29]*Ibid.* This does not include Globe, which is not classed as a major company and does not carry stocks of gasoline beyond those necessary to meet its current demand. (Shatford, R. 1075, 1076.)

[30]Shatford, R. 995, 1009.

[31]Shatford, R. 1011, 1013.

[32]Shatford, R. 1011.

[33]Shatford, R. 1009.

[34]Shatford, R. 1012.

[35]Shatford, R. 1009-10.

3. *The 1934 buying programs.*

(a) Generally.

Perhaps the reduction in major company inventories kept the price of gasoline from falling as low as it otherwise would have done. It did not, however, improve the price, for the hot gasoline coming out of East Texas more than balanced the inflationary effect of refinery control.[36]

[*The respondents offered to prove* that in May, 1934, the Planning and Coordination Committee passed a resolution asking certain major companies to buy a quantity of gasoline in May, equal to three per cent of their sales. This undertaking, however, failed to affect the price level substantially.[37]]

In June the Administration launched the first of a series of formal "buying programs" under Section 6 of the refinery amendment. Under these programs the majors were to purchase the distress gasoline, and sometimes the entire output of independent refiners.

It appeared incidentally from Arnott's testimony that under these programs:

(1) The purchasing companies were required to buy gasoline whether they needed it or not;

(2) The amount to be purchased was determined by the size of the purchaser;

(3) There were definite contractual commitments to buy the gasoline from the independent refiners;

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[36]Collett, R. 1805.

[37]Shatford offer, R. 1048.

(4) The prices at which the gasoline was to be bought and sold were fixed above the market; and

(5) Some of the independent refiners used the programs to dispose of their entire output of gasoline to the purchasing companies.[38]

It also appeared that all the 1934 buying programs were carried on with the approval of Secretary Ickes.[39]

[*The respondents offered to prove* the following facts with respect to these programs.

(b) Bennette program.

[In June the Planning and Coordination Committee undertook what was called the "Bennette buying program."[40] It employed a standard form of contract, under which the purchasing companies agreed to take a certain quantity of gasoline at a fixed price, on condition that the selling companies would agree to abide by the Code and rules and regulations, and by their allocations.[41]

[The Bennette program was formalized to a greater extent than the May program had been. The Planning and Coordination Committee set up an office in East Texas where it brought the buyer and the seller together, helped

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[38]Arnott, R. p. 1702; redirect, R. 1799, 1800; Shatford offer, R. 1048, 1049. Steiger also testified (apparently referring to the agency agreement which never went into effect) that under these programs the resources of the various companies were pooled together in a central fund for the purpose of buying gasoline. (Steiger, R. 753.)

[39]Arnott, R. 1703; redirect, R. 1800.

[40]Howard Bennette, the president of the Western Petroleum Refiners' Association, was at this time National Coordinator under the Code. (Gray, R. 1828; Shatford, cross, R. 1078.)

[41]Shatford offer, R. 1048.

to carry on the negotiations as to price and quantity, issued definite quotas to the buying companies, and determined exactly how much there would be to sell.[42]

[The Secretary's order of approval[43] recited that certain refiners had accumulated large and uneconomic stocks of distress gasoline, part of which had been produced in excess of allowables; that shipments of such gasoline into commerce "have been destructive to the gasoline market"; that "the effect of this accumulated storage of excess gasoline has been to depress markets and cause a breakdown of the gasoline price structure throughout the United States to the detriment of independent, non-integrated refiners who purchase crude oil on a market stabilized by proration and are forced to sell gasoline on a distressed market caused largely by the shipment of illegally purchased gasoline into commerce at ruinous prices." The order also waived, as to gasoline bought under the program, certain requirements of the regulations under Section 9(c).

[The standard forms of contract used under the program[44] bound the purchasing company to purchase a fixed amount of storage gasoline at a fixed price on condition that the seller (the independent refiner) should abide by the production and refinery provisions of the Code. To assure the sellers' faithful performance of this provision 25% of the purchase price was to be withheld from 45 to 90 days after shipment. The contract was to be signed, not only by the buyer and the seller, but by Secretary Ickes as well.

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[42] *Ibid.*

[43] Def. Ex. 845 for identification, R. 3372.

[44] Def. Ex. 845 for identification, R. 3372, 3374-5.

(c) Enlarged Bennette program.

[On August 13, the Bennette program was expanded by another order,[45] whereby new standard forms of contract were made available for the purchase, not only of excess gasoline in storage, but of currently produced legal gasoline. Under one of these forms the purchaser could bind himself to take a fixed quantity of gasoline monthly at a fixed price for a period of several months.

(d) France program.

[On August 8th, Secretary Ickes approved the so-called "France buying program."[46] Under this program the Planning and Coordination Committee established a "Program Committee" with offices all over the country. This committee not only brought the buyer and seller together, but determined the prices to be paid under the contracts. These prices were in all cases arbitrarily fixed at one cent or more above the prevailing tank-car quotations. The program made it difficult to enforce the hot oil regulations, because the purchasing companies undertook to buy all the gasoline available, whether legal or illegal.[47]

[The France program and the establishment of the Program Committee thereunder were formally approved by Secretary Ickes under Section 6 of Article IV of the Code.[48]

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[45]Def. Ex. 847 for identification, R. 3386.

[46]Shatford offer, R. 1049. Jacob France, one of the former defendants in this case (now dismissed), was chairman of the committee which supervised the program. (*Ibid.*)

[47]Shatford offer, R. 1049, 1056.

[48]Shatford offer, R. 1049; Def. Ex. 846 for identification, R. 3376.

(e) Horween program.

[In November there was an attempt to revive the France buying program under the name of the "Horween program."[49] This program was undertaken under the same authority as the France program and employed the same contract forms, with the exception of two alterations which were made in the contracts. It was highly formalized, and the Planning and Coordination Committee requested and secured the Administrator's formal approval.[50]]

In November, 1934, Secretary Ickes stated that the legality of these buying programs had been questioned.[51] [As the orders approving them show, all of them contemplated the purchase of illegally manufactured gasoline.[52] After the Secretary's statement, the excessive amount of overproduction in East Texas forced the abandonment of the last program.[53]]

(f) The objectives of the buying programs.

[The objectives which the Government was attempting to achieve in sponsoring these buying programs are described in the Annual Report of the Secretary of the Interior for the year ending June 30, 1935,[54] as follows:

> ["During the summer and fall of 1934 wholesale prices for petroleum products were below parity

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[49]Shatford offer, R. 1049. Ralph Horween was the administrative Assistant to Secretary Ickes (Franklin offer, R. 943).

[50]Shatford offer, R. 1049; Def. Ex. 844 for identification, R. 3367.

[51]Arnott, cross, R. 1743-4.

[52]See Def. Exs. 844-847, R. 3367-86.

[53]Def. Ex. 917 for identification, R. 3522, 3524; Shatford offer, R. 1051.

[54]Def. Ex. 917 for identification R. 3522, 3524.

with the current prices for crude petroleum, which presented a particularly serious problem to the non-integrated refiner. Several plans were projected by the industry to solve the difficulty, which was aggravated considerably by the excessive amount of hot oil and interstate movements of hot gasoline in interstate commerce. The planning and coordination committee proposed a form of contract designed to remove distress stocks of east Texas from the market. The form of contract was approved on June 23, 1934, and during the months of July and August gasoline in east Texas was purchased under this form of contract, to which the administrator was a party and which provided that the sellers would not process 'hot oil.' This program proved insufficient, and a new form of contract for the purchase of current output was approved. But the production of gasoline from 'hot oil' continued, stocks of gasoline mounted, wholesale prices for gasoline remained below parity with crude-oil prices, and in the early fall of 1934 the industry approached a serious collapse of the wholesale market. The planning and coordination committee appointed a program committee, which proposed a broad plan for the purchase of surplus gasoline with the purpose of also preventing illegal production of crude oil and providing a method of orderly marketing. The excessive amount of overproduction in Texas made the initiation of this program futile, and it was never put into operation.* * *"]

4. *Failure of the efforts to raise gasoline prices to parity.*

As noted above, the continued distress of the independent refiners was largely due to the fact that neither the state authorities, acting under their proration statutes, nor the Federal Government, acting under Section 9(c) of

the N. I. R. A., could check the production and interstate shipment of hot oil and hot gasoline in East Texas. On October 18, 1934, over a year after the effective date of the Code, Secretary Ickes issued a new set of regulations under Section 9(c) whereby anyone who sought to ship crude oil or gasoline in interstate commerce was forced to produce a permit or "tender" issued by a "Federal Tender Board." Such tenders were to be issued only when it had been proved "to the satisfaction of the Board" that the crude oil in question, or the crude oil from which the gasoline had been refined, had been produced in conformity with the state regulatory statutes.[1] On October 22, the Acting Secretary of the Interior set up the first Federal Tender Board under the new regulations.[2] It operated for about three months,[3] and succeeded in achieving at least a partial control over the shipment of hot gasoline out of the State of Texas. As a result the price of regular gasoline rose 5/8¢ between October 29 and November 12,[4] and the price of third grade gasoline rose 1½¢ between October 17 and November 7.[5] The price of 60-64 octane gasoline, however, was still far below the 5½¢ a gallon, which it should have reached under the 18.5 to 1 ratio provided in Section 6 of Article II of the Code. On December 31, 1934, the average of the market journal quotations for gasoline of 62 octane rating and below (third grade) was

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[1]Def. Ex. 6, R. 2602.

[2]Def. Ex. 7, R. 2612.

[3]Dyer, R. 1466.

[4]Govt. Ex. 672, R. 3091.

[5]McDowell was under the impression that the price of third grade gasoline had risen 2¢ within 30 days. McDowell, R. 1223. The Defense's offer of proof showed that the facts were as stated in the text. (Def. Ex. 849 for identification, R. 3397; Shatford offer. R. 1061-2; Van Covern offer, R. 1498-500.)

3.9¢. Even the average of the quotations for 68-70 octane gasoline (regular) was only 4.65¢. On this basis, the average price for 64 octane gasoline could not have been over 4¼¢ a gallon,[6]—almost 25% below parity.[7] Since, as shown above, it cost the average Mid-Continent refiner 5¢ or more to manufacture third grade gasoline, the prevailing price was substantially below his cost of production.[8]

The Government had failed in all its efforts to help the independent refiner by raising the price of gasoline to parity with dollar crude. Secretary Ickes recognized this in a speech which he made before the American Petroleum Institute in Dallas, Texas, on November 14, 1934:[9]

> "If each of you will look back over the past years and, without prejudice or passion, compare present conditions with those of the summer of 1933, you will all find definite improvement in the industry as a whole.
>
> "I know it might be difficult for some of you to reach such a conclusion. The refiner who has had to buy his crude oil supply at posted prices and sell his products at the levels which have prevailed might be reluctant to admit that there has been any improvement. His lot has been the hardest of all. Most of these refiners have been extremely patient while waiting for the sun to shine. They may feel that they have been forgotten, but I can assure them that this is not so. Much that has been done during the past several months has had as its particular ob-

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[6]Lanzer, cross. R. 269.

[7]McDowell. R. 1181.

[8]See p. 39, *supra*.

[9]Def. Ex. 968, R. 3690. McDowell testified that these conditions continued until the spring of 1935. (McDowell, R. 1164-5, 1166.)

jective the strengthening of the position of the non-integrated or the partially-integrated refiner. The allocation of gasoline production quotas under the Code and the program for the purchase of distress gasoline both had this as a common purpose. Each of these did its share of good, but the full measure of their accomplishment was not possible because of the 'hot' gasoline from East Texas which kept moving into interstate commerce, and because of the price wars which raged in the territory East of the Rockies in the bitter struggle for gallonage.

"I realize that East Texas has been an exceedingly popular dumping ground for complaints. It is the land of abilis. It undoubtedly has been blamed for many of the ills of the industry which have had their roots in other soil, but I feel very strongly that East Texas must carry a heavy share of blame for the conditions which weakened the wholesale gasoline market. How could it be otherwise when one of the principal news services of the industry has daily published the fact that gasoline, allegedly manufactured from 'hot' crude, could be purchased at a price materially less than that made from legally produced crude?"

[*The respondents offered to show* the following facts regarding the condition of the independent refiners at the end of 1934:

[In January and February 1935, virtually all of the independent refineries east of the Rocky Mountains which were operating on legally produced crude oil, were operating at a loss.[10]

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[10]Swensrud offer, R. 1429. A typical independent refiner in the Mid-Continent made a net refinery profit of $2,781 in 1932, had a refinery loss in 1933 of $6,795, and a net refinery loss of $56,450

[The primary cause of these losses was the disparity between the price of gasoline and the high cost of crude oil which had been maintained at $1 per barrel since September, 1933. With crude oil at $1, the minimum gasoline price necessary to enable a refiner to meet his costs and realize *a fair profit* would have been 6 cents a gallon. During the last three months of 1933 and the year 1934, however, the price averaged only 4.67 cents a gallon. In February, 1935, the price averaged 4.57 cents. The deficiency amounted to approximately 30 cents a barrel on each barrel of crude oil. If the Code ratio of 18.5 to 1 had actually prevailed during the period from the adoption of the Code up to February, 1935, the price of crude oil would have ranged from 95 cents in October, 1933, down to 78 cents in October, 1934, and 81 cents in February, 1935. Instead the price of crude oil remained $1 per barrel throughout this entire period, and the independent refiners were forced to absorb the difference.[11]

[Crude oil was not the only cost factor which had increased. Operating costs for the sixteen months from September, 1933, through the end of 1934, averaged 38½ cents per barrel of crude higher than during the preceding sixteen months. The Code had increased refinery labor costs by 25 or 30 per cent, fuel costs by 25 to 50 per

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in the first eleven months of 1934. Other refiners in this area who had been making substantial profits in 1931 and 1932 began to lose money after the Code was adopted and sustained annual losses of as much as $75,000 in 1934, in spite of increased operating efficiency. One of them realized approximately 21 cents less per barrel of crude oil in 1934 than in 1933. These losses were all calculated without inclusion of interest on the investment. In all cases, also, refinery operating expenses were relatively low and the management of the business was competent. (*Ibid.*)

[11]Swensrud offer, R. 1430.

cent, and material and construction costs by 25 to 30 per cent. During the same period (September, 1933, through December, 1934) the net realization from the products of a barrel of crude oil had increased only 27 cents a barrel. The independent refiner was therefore worse off during the code period by 11½ cents a barrel. Since the refining industry had already been suffering losses prior to the N. I. R. A. Code, refinery losses in general were at least 11½ cents for each barrel of crude oil which was refined.[12]

[Oklahoma refineries reporting in October, 1934, had an average cost, exclusive of interest on the investment, of 5.3 cents a gallon on regular (68-70 octane) gasoline. Including interest, the average cost was 5.6 cents a gallon. However, in that month the average tank-car price was 4.5 cents in the Oklahoma market and 4 cents in the Chicago resale market. In February, 1935, prices in the Oklahoma market were just about the same and prices in the Chicago market only about .3 cents higher. In other words, on the basis of these average costs, independent refiners were losing from .7 cents to .9 cents a gallon in October, 1934, and about the same in February, 1935.[13]

[Inefficient refineries had been virtually eliminated before the beginning of the N. I. R. A. Code. Under ordinary circumstances, if there had been a normal relationship between the prices of gasoline and crude oil, the independent refiners could have continued to do business and compete with the larger integrated refiners. However, under the conditions which prevailed in 1934 and the first

[12]Swensrud offer, R. 1428-9.
[13]Swensrud offer, R. 1430.

two months of 1935, these independent refiners were being driven out of business, no matter how efficient they were. In fact the low gasoline prices and increased refinery costs during 1934 had already caused the shutting down of many refineries, and the dismantling of others. The number of operating refineries declined from 454 on January 1, 1934 to 435 on January 1, 1935; while the number of inactive plants increased from 137 to 196, the highest number in the history of the country.[14]

[If conditions had continued as they were in 1934 and the first two months of 1935, a great many more independent refiners would soon have been forced to shut down and the refining business would have been left almost entirely in the hands of large integrated companies. Large numbers of marketers depend on independent refiners as their source of supply of gasoline.[15]]

The independent refiners were not the only ones who suffered. It cost a major company—the White Eagle Division of Socony-Vacuum—4⅛¢ a gallon to manufacture third grade gasoline and 4⅞¢ a gallon to manufacture regular.[16] Yet, as shown above, the average of the market journal quotations for third grade gasoline at the end of 1934 was 3.9¢ and that for regular gasoline was 4.65¢.[17]

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[14]Swensrud offer, R. 1428, 1431.
[15]Swensrud offer, R. 1432.
[16]Govt. Ex. 306, R. 2957.
[17]See pp. 56-7, *supra*.

E. Stabilization of the retail market—The General Stabilization Program.

1. *The spread of price wars in 1934.*

Throughout the period described above, while the tank-car market was resisting all efforts to raise it to parity, the retail market was being swept by a series of price wars.[1]

The price wars in 1934 surpassed in number and extent any in the history of the industry. It was unusually easy for a price-cutter to start a price war, at this time, for there were huge quantities of cheap gasoline available. Both hot and distress gasoline could be purchased at prices so far below the going tank-car market that the price-cutters could cut below any differentials which the branded operator could tolerate without losing a substantial amount of his business.[2]

Sellers of gasoline which is not nationally advertised usually have to take a slightly lower price for their product. When, however, the spread between the price of the unbranded product and the advertised brand became substantial, the sellers of the branded product are forced to lower their prices or else see a large part of their business go to the unbranded marketers.[3]

When the unbranded operators attempted to increase their gallonage by selling under the normal differentials, the branded operators made similar cuts to protect their

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[1]Frey, R. 1274-5.

[2]Shatford, R. 1002; Frey, redirect, R. 1327, 1328; Arnott, R. 1691, 1710.

[3]Swensrud, R. 1451, 1456-7. See also Swensrud, R. 1385; McDowell, R. 1172-3; Marshall, R. 1316-7; Frey, R. 1328; Arnott, R. 1691.

business. The price-cutters would then make further cuts to maintain their advantage, the branded operators would retaliate,[4] and the process might be continued until all parties were selling below the cost of production.[5]

Once started, price wars spread with alarming rapidity, for a price cut in a single city would almost invariably be followed by cut prices in the neighboring towns and eventually throughout the entire state.[6]

Price wars also spread very rapidly from one grade of gasoline to the others, and from the retail to the wholesale market. If the price of third grade gasoline dropped more than a cent below that of regular gasoline, and the price of regular gasoline was not reduced correspondingly, some customers would switch to third grade and sales of regular would be materially reduced.[7] As soon as the retailers' margins were reduced by price wars, they turned to their suppliers (jobbers or refiners) for protection, and the latter had to reduce the tank wagon price to keep their customers.[8] When the price war began to cut into the jobbers' margins, they turned to *their* suppliers—the refiners—to protect them. Thus, price cutting was eventually reflected in a reduction in the tank-car market.[9] Price cutting in the wholesale market expanded even more rapidly. A cut in the tank wagon price at a bulk station automatically meant a cut in the five or six towns which

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[4]Arnott, R. 1691.

[5]Frey, R. 1274.

[6]McDowell, R. 1172-3; Marshall, R. 1239-40. Swensrud told how a price war in Detroit diverted some 34 per cent of the business from stations in Toledo, fifty-four miles away. (Swensrud, R. 1387-8.)

[7]Swensrud, R. 1405; cross, R. 1457.

[8]Swensrud, R. 1388-9; Arnott, R. 1691.

[9]Swensrud, R. 1389-90; Arnott, R. 1692.

were served by that station.[10] And since the territories served by competing stations often overlapped, the price cutting would probably be carried over into the adjoining territory where no cuts had theretofore been made.[11]

The following table[12] shows the number of subnormal tank wagon and service station prices posted by Standard of Indiana in successive months during 1934:

Date	Regular Gasoline		Third Grade	
1934	T.W.	S.S.	T.W.	S.S.
Jan. 31	24	62	555	330
Feb. 22	18	73	588	369
Mar. 29	11	70	351	479
Apr. 28	62	410	873	948
May 31	96	548	915	968
June 30	240	993	1,090	1,353

The above figures become more striking when it is noted that Standard of Indiana posts only 4,000 tank wagon prices in the whole Mid-Western area,[13] that each subnormal tank wagon price would affect an average of five surrounding towns, and that each subnormal service station price would affect an entire city—perhaps one like Chicago with hundreds of service stations.[14]

At this point the price wars were affecting the market on all levels—service station, tank wagon and tank-car. Every element in the industry was suffering.[15]

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[10]Marshall, R. 1239, 1240.
[11]Arnott, R. 1690.
[12]Def. Exs. 910, 911, R. 3509, 3510.
[13]Marshall, R. 1233.
[14]Marshall, R. 1240.
[15]McDowell, R. 1173; Frey, R. 1332; Swensrud, R. 1388-9; Arnott, R. 1690, 1691, 1692-3.

2. *The letter of July 20, 1934.*

For a time the Petroleum Administrative Board itself tried to deal with these price wars. In the beginning of 1934, it commenced to negotiate agreements between the marketing companies and to persuade individual companies to lead the way by raising the price level voluntarily to see if it would stick. Dr. Frey of the Board was working along these lines early in the summer of 1934.[16] As shown by the above table, however, these efforts were fruitless, and the price wars increased steadily both in number and in extent.

Finally, on July 9, 1934, members of the Petroleum Administrative Board called on the Marketing Committee and asked the respondent Arnott if he would undertake the responsibility of heading a voluntary, cooperative movement to deal with local price wars. They said that the situation was entirely out of hand; that price wars had become so numerous that it was physically impossible for Secretary Ickes or the Board or its enforcement agents to deal with them; and that the only possible solution was to turn to the industry Code authorities who had an extensive and highly integrated organization in every section of the country.[17]

At this time the retail price structure in the entire Mid-Western area was, on the average, more than 2¢ below normal. The members of the Petroleum Administrative Board and the Marketing Committee discussed the reasons for this at some length. Arnott pointed out that it would be impossible to stabilize the retail market

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[16]Frey, R. 1276.

[17]Arnott, redirect, R. 1796-7.

unless the tank-car market were also stabilized through the elimination of hot oil and distress gasoline.[18]

The members of the Board replied that if Arnott were willing to take the responsibility of dealing with price wars, they would not attempt to tell him how to do it, but would authorize him to deal with the "elements of conflict" which caused price wars.[19]

A few days later, on July 20, 1934, Arnott received the following letter[20] from Secretary Ickes:

"ADMINISTRATION OF THE PETROLEUM INDUSTRY

Washington

Interior Department Building

July 20, 1934

Mr. C. E. Arnott, Chairman,
Marketing Committee,
Planning and Coordination Committee,
Investment Building,
Washington, D. C.

My dear Mr. Arnott:

It has been brought to my attention that the market for gasoline and other petroleum products has recently been disturbed by numerous price wars in many different localities and states. This has resulted in causing petroleum products to be sold below cost in some areas in order to meet unrestrained competition, and has in turn depressed the wholesale market for such products, thereby leading to the building up of surplus and to the economic and physical waste consequent thereon.

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[18]Arnott, redirect, R. 1797-8.
[19]Arnott, redirect, R. 1798.
[20]Govt. Ex. 891, R. 3487.

Such conditions have a strong tendency toward, and in many instances have resulted in, the payment of wages below the minimum established by the Code, and in the working of employees for a period beyond the maximum hours provided for by it. Furthermore, price wars necessarily injure small independent marketers who are unable to dispose of their products profitably when prices sink to ruinous levels. It would appear, therefore, that we are faced with conditions which would, if uncontrolled, tend to frustrate the purposes of the National Industrial Recovery Act by increasing unemployment, reducing standards of labor, and preventing the rehabilitation of industry, which the Act was intended to achieve.

Under Article VII, Section 3 of the Code it is the duty of the Planning and Coordination Committee to cooperate with the Administration as a planning and fair practice agency for the industry. I am, therefore, requesting you, as Chairman of the Marketing Committee of the Planning and Coordination Committee, to take action which we deem necessary to restore markets to their normal conditions in areas where wasteful competition has caused them to become depressed. The number and extent of these situations would make it impractical for the Petroleum Administrative Board acting alone to deal with each specific situation. Therefore, I am requesting and authorizing you, as Chairman of the Marketing Committee, to designate committees for each locality when and as price wars develop, with authority to confer and to negotiate and to hold due public hearings with a view to ascertaining the elements of conflict that are present, and in a cooperative manner to stabilize the price level to conform to that normally prevailing in contiguous areas where mar-

keting conditions are similar. Any activities of your Committee must, of course, be consistent with the requirements of Clause 2 of Sub-section (a) of Section III of the Act, and if in any situation it should appear that this Section is not being complied with, the matter should be referred to the Petroleum Administrative Board.

I trust that I can count on your cooperation.

Sincerely yours,

(s) HAROLD L. ICKES
Administrator of the Petroleum Industry."

As the letter shows, Arnott was at this time not only a member of the Planning and Coordination Committee, but the chairman of its Marketing Subcommittee.[21] As such, he had already had some experience with attempts to achieve industry cooperation and compliance with the Code. The Marketing Committee had a large organization of regional, state, local and temporary committees, representing every element in the industry, which had been working for over nine months to bring about a better understanding of the Code, compliance with its provisions, and the elimination of unfair marketing practices and price disturbances.[22]

[*The respondents offered to show* that on two occasions in the fall of 1933 the Petroleum Administration had requested Arnott to undertake informal programs of voluntary cooperation with a view to restoring prices. In one case the Planning and Coordination Committee, acting at the request of J. H. Marshall of the Petroleum Adminis-

[21] Arnott, R. 1687.
[22] Arnott, R. 1687-8.

trative Board, had asked Arnott to undertake a program for the purchase of crude oil by major companies from independent producers.[23] In the other, J. A. Moffett, one of the Government representatives on the Planning and Coordination Committee, had requested him to persuade the major companies to eliminate subnormal prices throughout the country.[24]]

3. *The Titus opinion.*

Before proceeding with his duties under this letter, Arnott asked Louis Titus, the Chairman of the Planning and Coordination Committee's Legal Subcommittee and the general counsel of the Planning and Coordination Committee itself, for his legal opinion as to the scope of the letter.[25]

[*The Defense offered to show* the nature of this opinion and the circumstances under which it was prepared. The offered proof would have shown the following:

[Upon being asked for his opinion, Titus went to see Charles Fahy, the Vice-Chairman, and, at that time, the acting Chairman of the Petroleum Administrative Board. From his previous contacts with Fahy, Titus believed that he had administrative authority to act for Secretary Ickes in all Code matters except those of extreme importance and those which involved signing orders and agreements. He told Fahy that Arnott had asked him to write an opinion as to the effect of the anti-trust laws on the activities proposed under the letter of July 20, 1934; that he was not

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[23]Franklin offer, R. 992-4.
[24]Moffett offer, R. 1155.
[25]Arnott, R. 1737.

satisfied with the letter; and that he thought that Secretary Ickes should approve any industry agreements or arrangemens entered into to settle price wars or eliminate their various causes.[26]

[Fahy not only did not concur, but objected strenuously to the prospect of having to run to Secretary Ickes every few days to get orders of approval. He said that it was not practical to work the matter out in that way; that the Government had assisted the oil men materially; and that it was only fair that the oil men should appreciate this and cooperate with the Government in its efforts to stabilize this industry. He said that the letter of July 20, 1934, was a direction to Arnott to eliminate price wars and get prices back to normal, and that "You don't need the orders of approval which you are requesting. This letter is a complete protection to you. It is all you can possibly need. • • • You apparently are afraid of your own shadow. You can't possibly think that the government will actually prosecute you for something the government is demanding that you do."[27]

[Titus replied that it did not seem to him that it would be very much trouble to get an order for each separate arrangement or each separate meeting. Fahy flatly refused to do this and again reiterated, "This letter now, which the Administrator has signed, is all you need."[28]

[Either the same day or a day later, Titus discussed his conversation with Fahy with Arnott, Majewski, and other members of the Marketing Committee and Planning and

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[26]Titus offer, R. 1833-4.
[27]Titus offer, R. 1834.
[28]*Ibid.*

Coordination Committee, giving Arnott a detailed description thereof, including the words just quoted.[29]

[On July 31, 1934, Titus submitted to Arnott his legal opinion[30] as to the effect of the anti-trust laws on the activities under the letter of July 20, 1934. It read as follows:

> ["Referring to the letter written to you by the Administrator of the Petroleum Industry, dated July 20, 1934, I beg to say that said letter is full and complete authority for the taking of necessary steps to restore markets in any locality to their normal condition. I have also considered this letter in connection with the Anti-Trust laws and my opinion thereon is as follows:
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> • • •
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> ["From • • • (the provisions of the N.I.R.A.), it is evident that if the President should approve any agreement for the stabilization of prices that such approval by the President would be a complete protection against any charge that the Anti-Trust laws had been violated by such agreement.
>
> ["Under Paragraph (b) of Section 2 of Title 1 of the Act the President was authorized to delegate any of his functions and powers under Title 1 to such agents as he might designate. In accordance with this Section, the President did delegate his powers, insofar as the Petroleum Industry is concerned, to Mr. Ickes. Therefore, any action of Mr. Ickes with regard to such agreements within the Petroleum Industry is in effect the act of the President. So that, if an agreement to restore prices were made in any locality and such agreement should be approved by Mr. Ickes, such ap-

[29]Titus offer, R. 1834-5.
[30]Def. Ex. 892 for identification, R. 3489.

proval would be a complete protection to all persons participating in the agreement from any prosecution under the Anti-Trust laws. However, the letter which Mr. Ickes has written is not precisely an approval of any agreement. It is a direction to you, as Chairman of the Marketing Committee, to take action to restore markets to their normal conditions in areas where such markets are depressed. You are also authorized to designate committees for each locality where price wars have developed and 'in a cooperative manner to stabilize the price level to conform to that normally prevailing in contiguous areas where marketing conditions are similar.' You and your committees appointed by you are thus authorized to stabilize the price level 'in a cooperative manner.'

["The word 'cooperative' means to operate jointly or together, so there can be no question that this is authority for making, in any locality where prices are depressed below normal, an agreement which will restore such prices to a normal level. The only condition attached to this is found in the last sentence of the last paragraph of the letter, which provides that any action of any committee appointed by you must be consistent with Clause 2 of Sub-section (a) of Section 3 of Title 1 of the National Industrial Recovery Act. The clause referred to refers particularly to codes of fair competition, and it provides that the President may approve codes when he finds (a) that they are not designed to promote monopolies; (b) that they are not designed to eliminate or oppress small enterprises; (c) that they will not operate to discriminate against small enterprises; (d) that they will tend to effectuate the policy of Title I of the Act; (2) that they shall not permit monopolies or monopolistic practices.

["It is clear that no committee appointed by you would even consider an agreement which would have any of the objectionable features provided in this Section. On the contrary, the duty of the committee is to restore prices to a normal level. Restoring prices to a normal level must necessarily aid small enterprises rather than oppress them. It must necessarily have a tendency to check monopolies rather than to promote or permit monopolies.

["My conclusion is that this letter from the Petroleum Administrator is for all practical purposes a complete protection to you and your committees to engage in all reasonable activities to restore prices to normal levels.

["I further conclude that the agent of the President having solicited the taking of action to stabilize prices, that it is unthinkable that there could ever be any prosecution or criticism by the Government for doing the very thing which the President's agent had asked you to do."

[The last two paragraphs of the opinion expressed briefly the substance of the statements which Fahy had made to Titus and which Titus had repeated to Arnott.[31]

[This opinion was mimeographed and distributed throughout the industry.[32] Fahy received a copy of it, but he never questioned any of the statements which Titus had made in the opinion.[33]].

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[31]Titus offer, R. 1835-6.
[32]*Ibid.*
[33]Titus offer, R. 1836.

4. *The organization of the General Stabilization Program.*

After receiving the letter of July 20, 1934, Arnott proceeded to set up a new organization—the Stabilization Committees. He appointed a "General Stabilization Committee" with headquarters in Washington, and a Regional Chairman of Stabilization in each Region. The latter, in turn, set up complete field organizations, composed of state and local committees. In all cases, Arnott gave standing instructions that the committees should embrace representatives of every element in the marketing branch of the industry.[34] There were over fifty such committees in all.[35]

The stabilization committees continued the work which the Petroleum Administrative Board had already started.[36] They were also active in persuading groups of jobbers and dealers to agree to eliminate selling below cost, selling below the posted price and various kinds of chiseling.[37]

The Petroleum Administrative Board, and especially Dr. Frey, worked very closely with Arnott and the committees until the end of the Code on May 27, 1935.[38]

5. *The gradual expansion of the General Stabilization Program.*

Originally it seems to have been intended that all or most of the stabilization work should be done by local committees acting locally.[39] For a time the program was

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[34]Arnott, R. 1688.
[35]Arnott, R. 1745.
[36]Frey, R. 1276.
[37]Frey, R. 1275.
[38]Frey, R. 1267, 1275, 1276, 1277.
[39]This is shown by the letter of instructions which A. G. Maguire, the chairman of the Region 3 Marketing Committee, sent to the chairmen of the State Marketing Committees in the Middle West on July 24, 1934 (Govt. Ex. 1031, R. 3874).

actually carried on this way.[40] The Petroleum Administrative Board and the committees soon discovered, however, that it was impracticable to solve the problem on a purely local basis.[41] As a result, the scope of the program was gradually expanded, and the stabilizers began to deal with larger areas, beginning with the State of Michigan, and then taking up the problems of several states at once.[42]

Treatment by states was not entirely successful either. In fact, the number of price wars increased during July and August.[43] Finally, on September 11, 1934, Standard of Indiana was forced to adopt a new price policy which had the effect of reducing the normal price level by an average of 1.6 cents throughout the territory.[44]

At this point the scope of the stabilization program was expanded again. On September 20 or 21,[45] Arnott called the first of a series of meetings which dealt with the problems of the whole Mid-Western area. Some of these meetings dealt with the even larger territory stretching from the Rocky Mountains to the Ohio line.[46]

The letter of July 20, 1934 and the Titus opinion interpreting it were read at the very first of these General Stabilization meetings in September, 1934.[47] The meetings themselves were conducted very informally. Members of the industry who were disturbed by specific problems notified B. L. Majewski of the Deep Rock Oil

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[40]Frey, R. 1275.
[41]McDowell, R. 1173; Frey, R. 1276.
[42]Frey, R. 1276.
[43]Def. Exs. 910 and 911, R. 3509, 3510.
[44]Marshall, R. 1236.
[45]McDowell, R. 1166.
[46]McDowell, R. 1166; Frey, R. 1276; Arnott, R. 1689.
[47]McDowell, R. 1173-4.

Company. When the meeting was convened Majewski would call off each subject in turn and a general discussion would ensue.[48] Sometimes a committee would be appointed to deal with some particularly perplexing problem.[49]

In part, the General Stabilization work continued along the same general lines as the earlier efforts of the Petroleum Administrative Board and the local stabilization committees, eliminating price wars by negotiation.[50] The General Stabilization Meetings, however, had an advantage in that they could deal directly with the refiners who supplied the unbranded operators and price-cutters. As noted above,[51] the Code specifically authorized such suppliers to dictate the price at which their jobbers and dealers should sell. Some price wars could be eliminated by persuading the refiners to insert such provisions in their contracts and to enforce them.[52] Others required prolonged negotiations. Since the independent refiners supplied most of the unbranded operators and price-cutters, it was especially necessary to get their cooperation in these matters.[53]

The process of restoration was a gradual one. On many occasions, when the stabilization activities seemed to have achieved some decided benefit, the prices slid back again after a relatively short time.[54] On December 5, 1934, however, Arnott held another General Stabilization Meeting at the Blackstone Hotel in Chicago. Immediately

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[48]Arnott, R. 1693.
[49]Arnott, R. 1688.
[50]McDowell, R. 1176; Frey, R. 1276.
[51]See pp. 31, 34, *supra*.
[52]McDowell, R. 1175-7.
[53]McDowell, R. 1175, 1176.
[54]Frey, R. 1277; see also Def. Exs. 910 and 911, R. 3509, 3510.

thereafter, the respondent Ashton held a series of larger meetings which lasted four or five days and were attended by over 1,100 marketers, representing refiners, jobbers, dealers and price-cutters from all over the Middle West. These meetings were highly successful, and resulted in the whole or partial elimination of hundreds of subnormal prices.[55]

All during this period the Petroleum Administrative Board had kept in close touch with what was going on, both through its own participation in the stabilization work and through reports from Arnott.[56] On December 18, 1934, Arnott made one of these reports to Chairman Fahy and Dr. Frey, the marketing member of the Board, in Washington.[57] He explained what had been done with respect to the restoration of retail markets at the December meetings and told them about the many points which had been restored to normal, the many more which had been half restored, and the others that had not been restored at all. Finally he told them that he was going to call another meeting in the near future to follow up the matter.[58]

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[55]McDowell, R. 1172, 1173; Frey, R. 1277; Arnott, R. 1689, 1728; cross, R. 1742-43.

[56]Frey, R. 1267, 1275-76, 1277; redirect, R. 1334.

[57]Arnott, R. 1727-8.

[58]Arnott, R. 1728. It might be added that Arnott's views as to the necessity of "following up" seem to have been justified, for the price wars were still continuing (Frey, R. 1277) and the rate of improvement was decreasing. During the first 17 days of December the work of the stabilization committees had resulted in the restoration of 102 subnormal posted tank wagon prices. Only 30 such prices were restored during the remainder of that month. Only thirty-eight were restored during January, and only seven during February (Def. Ex. 910, R. 3509). Of the 673 remaining subnormal postings for third grade gasoline, only fifty-four were restored to normal during the last part of December, only twenty-six during January, and only eighteen during February. (Def. Ex. 911, R. 3510.) Price wars continued to plague the industry throughout 1935. (McDowell, R. 1174, 1175-6.)

IV.

The Mid-Continent Buying Program.

A. The appointment of the Tank-Car Stabilization Committee.

The General Stabilization Meeting of which Arnott had notified the Petroleum Administrative Board in December was held at the Blackstone Hotel in Chicago on January 4, 1935.[1] It was attended by about 40 or 50 people, including all five of the individual respondents, representatives of all the respondent companies, and a number of others.[2]

Arnott opened the meeting with the explanation that it had been called to consider various problems of general stabilization.[3] He then reviewed the progress which had been made since the December meeting, pointing out that there were already indications that the gains were not holding, and that unless the industry kept up its efforts it would soon be back where it had started.[4]

In the course of a general discussion of the problem, B. L. Majewski, of Deep Rock, addressed the meeting on behalf of some twenty or twenty-five independent refiners whom he and I. A. O'Shaughnessy of Globe represented in stabilization activities. He emphasized their plight, and stated that unless something were done they would be forced either to close down or to withdraw from Code activities, abandon the Code standards of wages and hours,

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[1] Arnott, R. 1689.
[2] McDowell, R. 1167-8.
[3] McDowell, R. 1168.
[4] McDowell, R. 1168; Arnott, R. 1689.

and cut the price of crude oil. Several people, including O'Shaughnessy and the respondent McDowell echoed the thoughts expressed by Majewski. All agreed that the plight of the independent refiners affected the refinery operations of the whole industry and that something should be done. Two disturbing factors which were specifically mentioned were:

> (1) The influx of cheap gasoline into the territory which continued to undermine the retail price structure even after it had been improved; and
>
> (2) the condition of the independent refiners who had deluged Washington with complaints.[5]

Arnott reviewed the situation along the same lines[6] and upon a motion being made by Majewski, he appointed the following committee to study the situation and make a report.[7]

Name	*Company*
R. W. McDowell (Chairman)	Mid-Continent
H. T. Ashton (Vice-Chairman)	Lubrite Div. Socony-Vacuum
L. van Eeghen	Shell
A. M. Hughes	Phillips
E. Karstedt	Continental
I. A. O'Shaughnessy	Globe
E. J. Bullock	Standard of Indiana
P. M. Miskell	Empire

This committee will be referred to hereafter by the

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[5]McDowell, R. 1168; Arnott, R. 1691-2.
[6]Arnott, R. 1695.
[7]McDowell, R. 1169; Arnott, R. 1696-7.

name by which it subsequently came to be known throughout the industry: "The Tank-Car Stabilization Committee."[8]

B. The Panama decision.

Three days after the Tank-Car Stabilization Committee had been appointed this Court held Section 9(c) of the N. I. R. A. unconstitutional in the so-called "*Panama* case."[9]

Since the establishment of the first Federal Tender Board in October, 1934, very little hot gasoline had found its way into interstate commerce. Now, however, the Tender Board was stripped of its powers, and there was a renewed and substantial influx of hot gasoline into the Mid-Western territory. As a result the tank-car market broke sharply.[10]

C. The Petroleum Administrative Board informed of the committee's appointment.

On January 8 or 9, 1935, Arnott reported the appointment of the Tank-Car Stabilization Committee to the Planning and Coordination Committee in Washington.[1]

On the same day Arnott also told J. H. Marshall and N. L. Meyers of the Petroleum Administrative Board about

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[8]Jacobi, cross, R. 475.

[9]Panama Refining Co. v. Ryan, 293 U. S. 388 (January 7, 1935); McDowell, R. 1177, 1178; Arnott, R. 1700.

[10]McDowell, R. 1177, 1178; Van Covern, R. 1511. Nearly a million gallons of hot gasoline is known to have entered the Mid-Western area during January. During February the figure was in excess of 2,300,000 gallons. These are minimum figures inasmuch as a number of subterfuges were adopted to disguise the nature of the gasoline. (Dyer, R. 1467, 1468, 1469.)

[1]Franklin, R. 989; Arnott, R. 1697.

the committee's appointment. He explained what had been done to deal with retail price wars at the December meetings, and told them about the meeting of January 4, describing how the question of the independent refiner had come up, and what he had done in appointing the Committee. Meyers and Marshall expressed great interest in Arnott's statement as to his activities in the Mid-West and hoped that the stabilizers would be successful in maintaining the gains which they had made in the retail market. They also expressed interest in the formation of the Committee in connection with the tank-car market situation in the Mid-Continent.[2]

Arnott expressed concern over the *Panama* decision which had been handed down on January 7th, and asked what was being done to deal with the situation created thereby. Marshall and Meyers assured him that Secretary Ickes and the Petroleum Administrative Board appreciated the situation and that they were doing all they could in the preparation of a bill known as the "Connally Bill" which would reestablish the Federal Tender Board in East Texas.[3]

During the latter part of January Arnott telephoned McDowell once or twice and told him about the Connally Bill. He said that the bill had splendid chances of passing, and that if it did they would have a new Tender Board in East Texas and a general improvement in the situation. McDowell promised to assemble his committee as soon as

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[2]Arnott, R. 1698, 1699-1700.
[3]*Ibid.*

he could.[4] He finally called a meeting to be held in Bullock's office in Chicago on February 5, 1935.[5]

In the meantime, on January 28th, the former defendant I. A. O'Shaughnessy, of Globe, the representative of the non-integrated refiners[6] whom Arnott had appointed to the Tank-Car Stabilization Committee,[7] sent the following telegram[8] to Charles Fahy, the chairman of the Petroleum Administrative Board:

> "In my opinion the industry has a wonderful opportunity within its grasp at this time for stability if they will only accept it. We have really done a good job in stabilizing retail markets in Standard of Indiana territory, but this condition is not going to continue unless a supr me effort is made to get the tank-car price of gasoline up to a comparable basis with the crude structure. It seems inconceivable to me that we cannot accomplish this objective if the proper efforts were made. Mr. Arnott, as chief stabilizer, appointed a committee for this purpose about three weeks ago, but because of a recent court decision in East Texas[9] we have never met to discuss the situation. We are either supine or incompetent, because every time

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[4]McDowell, R. 1178. McDowell had already made two unsuccessful attempts to assemble the committee, once around January 15 or 16 and again about a week later. (*Ibid.*) Arnott had no recollection of these conversations. (Arnott, R. 1700.)

[5]McDowell, R. 1178.

[6]Arnott, R. 1694-5, 1728; O'Shaughnessy was granted a new trial (R. 2491).

[7]McDowell, R. 1169; Arnott, R. 1697, 1728.

[8]Def. Ex. 893, R. 3491.

[9]This referred to the Supreme Court's decision in the *Panama* case on January 7, 1935, which had invalidated Section 9(c) of the N.I.R.A. and forced the discontinuance of the Federal Tender Board (Arnott, R. 1728).

something comes up about East Texas we crawl to cover instead of endeavoring to map out a definite plan of constructiveness. I do not know what you can do about it because if we cannot help ourselves I am sure no one else can. Am wiring you merely to get it off my chest. What I want to bring out is the necessity for action in getting tank-car prices up before it is too late. I understand that, unless some action is taken to get tank-car prices up shortly, an organized effort will be made to get them down as low as possible so that a general breakdown will occur in service station prices. This, of course, will mean chaos. This for your information. Regards."

On February 1, 1935, Fahy replied to this telegram by letter[10] as follows:

"My dear Mr. O'Shaughnessy:

"I received your telegram of January 28 and was glad to hear from you again. I am sure you know that the tank car situation in relation to the price of crude is one about which we have no disagreement. How to bring about a correction is the stumbling block. I may say, however, that I see nothing in the recent Supreme Court decision which in any way affects endeavors to reach the solution. We are hoping soon for a report from the Special Committee which the Secretary appointed to look into this kind of thing and make recommendations. I really believe we are going to have some definite suggestions from them which will carry weight. In the meantime, we are considering your suggestions

[10]Def. Ex. 894, R. 3492.

and would like to have any further suggestions you can give us.

"Yours sincerely,

(s) CHARLES FAHY
Chairman."

On the same day (February 1, 1935) there was a general reallocation of duties among the members of the Petroleum Administrative Board. In this connection Secretary Ickes (who personally approved the reallocation on January 28[11]) officially recognized that the stabilization committees were engaged in stabilizing the wholesale market. Dr. Frey's "job sheet"[12] defined the work to be performed by him as follows:

"Work to be Performed:

"As a Member of the Petroleum Administrative Board to advise directly with the Oil Administrator on fundamentally important and basic problems concerning the Marketing provisions of the Code of Fair Competition for the Petroleum Industry and to direct the entire Marketing Division consisting of a large staff of Examiners, Accountants, Clerical Assistants in the administration of the operations of the oil administration.

"As a personal representative of the Administrator to negotiate and sit with Committees of those engaged in the stabilization of wholesale and retail markets throughout large areas of the United States; to formulate and advise the Oil Administrator as to the National policy in marketing of oil

[11]Def. Ex. 996, R. 3750.
[12]Def. Ex. 974, R. 3696, 3709-10.

under the Code of Fair Competition for the Petroleum Industry and the National Industrial Recovery Act; to assist the legal staff in the preparation of economic material for the trial of cases and to organize and direct the study of the costs of refining and marketing of petroleum products throughout the United States. * * *"

D. Preliminary meetings of the Tank-Car Stabilization Committee.

1. *Meeting of February 5, 1935.*

All of the members of the committee attended the first meeting on February 5th. There were also two or three guests, including representatives of Shell and Globe, and A. V. Bourque, the Secretary of the Western Petroleum Refiners' Association.[1]

McDowell outlined the purpose of the meeting, commented on the bad effect which the *Panama* decision had on the already unsatisfactory price situation, and expressed the hope that they would have some constructive suggestion to make to Arnott. This led to a general discussion of the market situation and the new influx of hot gasoline from East Texas.[2]

Finally, the respondent Ashton stated that while there was a lot of cheap gasoline coming out of East Texas, he did not think that the situation in the Mid-Continent was as bad as people thought. He asked Bourque to read a list which he had brought, showing the names of the independent refiners in the Mid-Continent area and the amounts of distress gasoline which they would have for sale dur-

[1]McDowell, R. 1178-9.
[2]McDowell, R. 1179.

ing the month of February. Bourque's figures showed that there would be only six or seven hundred cars of distress gasoline during the month.[3] Ashton pointed out that this was a relatively insignificant amount, and that ten or twelve of the major companies were buying gasoline in the area regularly.[4]

Someone suggested that they persuade these major companies to purchase the distress gasoline, but this immediately provoked an argument. The Continental and Standard of Indiana representatives both stated they did not think major company buying would do any good, because, with hot gasoline moving out of East Texas, it would be just like mopping up the ocean. They cited the failure of the buying programs which the Government had sponsored in 1934, and stated that they didn't want anything to do with another such program.[5] As an alternative, they suggested a cut in the price of crude oil. McDowell replied that it looked as though the proposed Connally Act would stop the shipment of hot gasoline out of East Texas, and that the Committee ought to do something. He stressed the desirability of obtaining the parity ratio of 18.5 to 1 prescribed in the Code and stated that it was quite evident that the Administration wanted to achieve such parity without cutting the price of crude oil.[6]

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[3] *Ibid.* The Western Petroleum Refiners' Association, of which Bourque was secretary, was a trade association composed principally of refiners (both major and independent) in the Mid-Continent area. It had been in existence for 25 years or more, and had always done statistical work, collecting data concerning the production, sales, and inventories of its members, issuing bulletins on the same, and passing on to its members information regarding the statistical position of the industry as a whole. (*Ibid.*)

[4] McDowell, R. 1179, 1182.

[5] McDowell, R. 1179-80.

[6] McDowell, R. 1181.

O'Shaughnessy supported McDowell's stand. He said that the independent refiners whom he represented were desperate. As an indication of how deeply he felt he read the telegram which he had sent to Chairman Fahy of the Petroleum Administrative Board and Fahy's reply thereto.[7]

Ashton thereupon made a suggestion. He pointed out that Bourque's survey showed some 600 or 700 cars of distress gasoline in the hands of some fifteen or seventeen independent refiners. On the other hand, some ten or twelve major companies were known to be normal buyers of gasoline. He thought it would be very helpful if information as to the availability of distress gasoline could be put into the hands of these major companies, and that it might be a proper function of the committee to gather such information month by month.[8]

This proposal provoked another discussion. It was again pointed out that major company buying, even on quite a large scale, had not accomplished anything in 1934. Ashton replied that these buying programs had not been handled right. The majors had merely continued to purchase from a few well-known independent refiners with whom they were well acquainted, thus giving them more business than they needed, and even encouraging them to overrun their federal refinery allocations. The smaller refiners, on the other hand had been left with distress gasoline on their hands. It was his thought that the major companies should scatter their purchases around, dealing with all the independent refiners who had distress gasoline to sell, and that the committee's functions should be to

[7]McDowell, R. 1181-2; Def. Exs. 893 and 894, R. 3491, 3492.
[8]McDowell, R. 1182-3.

furnish information which would enable them to distribute their orders in this way.[9]

Ashton also thought that the major companies ought not to take advantage of the distress of the independent refiners and compel them to sell at distress prices, thus forcing the market down still further. He felt that the major companies should be willing to pay the fair going market price.[10]

Finally, Ashton said, there was no need to have commitments, or allocation, or price fixing, or any of the other features which had been found objectionable in the 1934 buying programs. Instead, each major company could buy in line with its actual needs.[11] With the passage of the Connally Bill they could be assured that hot gasoline would no longer come into the Mid-Western market.[12]

McDowell stated that he felt that the plan had some merit; that he knew that his company would have to buy gasoline anyway because constant reductions in its refinery allocations had brought its inventories very low; and that it had always paid a fair price to the independents from whom it bought. Most of the others seemed to be favorably impressed too. They all indicated that their companies, like McDowell's, would be forced to buy some gasoline anyway. Some of them stated that they were already doing so and that they saw no reason why they could not fit their purchasing into Ashton's suggestion.[13]

Ashton summed up his suggestion in three basic principles, as follows: (1) There would be no pools or

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[9] *Ibid.*
[10] *Ibid.*
[11] McDowell, R. 1183.
[12] *Ibid.*
[13] McDowell, R. 1183-4.

central buying agencies: everyone would make his own deal with the selling company; (2) there would be no allocations, no commitments, and no percentage quotas: each company would buy in line with its actual needs; (3) the Committee would urge the companies to pay the fair going market price on each transaction instead of chiselling down on an already distressed price.[14] The plan would not be put into operation until the shipment of hot gasoline out of East Texas had been eliminated.[15]

A memorandum from A. P. Ruether, of Shell, to the respondent Lakin and the former defendant, Fraser,[16] indicates that at this meeting there was also discussed "the necessity of taking care of distress gasoline in order to preserve the stability of retail markets." The memorandum further states that a committee of three was appointed to take up the question of "allocating" individual independent refiners to major purchasers, with the idea that such major purchasers would take the distress product of said independents. It was suggested that in this way it might be possible to get the smaller refiners to stay within their refinery allocations under the Code.

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[14] *Ibid.* McDowell summarized the plan on the stand as follows: "* * * we felt there were some ten or twelve companies who were regular and normal purchasers of gasoline, and that this Committee might attempt to put these purchasers in touch with the sellers, for the purpose of giving these independent refiners an outlet that already existed for their distress gasoline. These major companies were buying gasoline and had to buy gasoline, and, as I tried to explain, they had been buying it from just a few companies. Our plan contemplated trying to get them acquainted with some of the smaller and lesser known independent refiners." (McDowell, R. 1218.)

[15] McDowell, R. 1185.

[16] Govt. Ex. 177, R. 2733.

McDowell was finally authorized to advise Arnott of the discussion and of the proposed plan. He did so within the next few days, adding that he had asked the committee to meet again in Chicago on February 11, after the General Stabilization Committee meeting, which had been set for that day.[17]

2. *Meeting of February 11, 1935.*

Arnott was unable to be in Chicago on February 11th, but he telephoned McDowell on the morning of that day and told him that he felt that the suggested plan had merit. He also said that he was almost sure that the Connally Bill would pass, and that the hot oil situation would be taken care of. He instructed McDowell to explain the plan to potential purchasing companies but to take no definite action.[18]

The Tank-Car Committee met in the evening after the General Stabilization Meeting. All the members were present. Also present were representatives of several major companies, which were regular buyers of gasoline, but which were not represented on the committee—Sinclair, Skelly, Barnsdall and Pure.[19]

McDowell opened the meeting with a few remarks about the circumstances under which the Committee had been appointed, and his telephone conversation with Arnott.[20]

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[17]McDowell, R. 1184-5.

[18]McDowell, R. 1185-6, 1189; Arnott, R. 1701.

[19]McDowell, R. 1186. The last named company was represented by the respondent McElroy. (*Ibid.*)

[20]*Ibid.* Sus. R. 1868-9.

Ashton then explained the committee's plan to the non-members. He said that the Connally Act would take hot East Texas gasoline off the market and prevent it from being a disturbing influence in Standard of Indiana territory, and that, with this gasoline out of the way, the surplus gasoline which might affect the Mid-Western area would, according to Bourque's latest survey, be limited to 600 cars a month coming from about fifteen independent refiners. He then said that it had been suggested that the major companies which were regular buyers of gasoline might be able to use this surplus.[21]

A number of people said that they didn't want to commit themselves to buy, and that they weren't going to have anyone telling them where or how they should buy. To each objection of this kind, Ashton pointed out that no such obligations were involved.[22] There were also several questions about the prices which should be paid. Ashton replied that this was not a price-fixing plan, that there was no basis for setting any price, and that his only suggestion was that the purchasing companies should pay the fair going market price for the gasoline which they bought.[23]. He also made it plain that the plan would not be put into operation until the Connally Bill had put a stop to the influx of hot gasoline into the Mid-West territory.[24]

Ashton then read off Bourque's new survey, and asked those present if any of them would prefer to buy from particular concerns. It developed that some of the companies were already buying from certain refiners and would like to continue to do so. Others had definite pre-

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[21]McDowell, R. 1182-4, 1186-7.
[22]McDowell, R. 1187.
[23]McDowell, R. 1188.

ferences, based upon old association or friendship. In this way, it was found that all but seven or eight of the independent refiners would be taken care of.[25]

Some one asked who would furnish the purchasing companies with the information they needed as to the availability of distress gasoline. It was pointed out that the original surveys might contain errors and that the situations of both buyers and sellers were certain to change between surveys. Ashton proposed that a "Mechanical Sub-Committee" be appointed to handle the detailed problems that arose between monthly surveys, to receive information as to the availability of distress gasoline, and to pass it on to the buyers, particularly if they needed it in a hurry. McDowell appointed such a committee, consisting of himself, Ashton, and O. J. Tuttle, the Tank-Car Sales Manager of Empire.[26]

It was at this meeting that Ashton coined the phrase "dancing partner" which was subsequently used to indicate the independent refiner from whom a major company regularly bought. McDowell described how it happened as follows:

> "• • • There were these 7 or 8 small refiners whom no one had mentioned. He [Ashton] said this situation reminded him of the dances that he used to go to when he was a young fellow. He said, 'Here we are at a great economic ball.' He said, 'We have these major companies who have to buy gasoline and are buying gasoline, and they are the strong dancers.' And he said, 'They have asked certain people to dance with them. They are the better known independent refiners.' He

[25] McDowell, R. 1187-8, 1189.

[26] McDowell, R. 1189-90; Sus, cross, R. 1870.

said, 'Here are 7 or 8 that no one seems to know.' He said, 'They remind me of the wallflowers that always used to be present at those old country dances.' He said, 'I think it is going to be one of the jobs of this Committee to introduce some of these wallflowers to some of the strong dancers, so that everybody can dance.' And from that simile, or whatever you want to call it, the term 'dancing partner' arose.'"[27]

A. H. Sus of the Sinclair Company attended this meeting and, after it was over, made a memorandum of his recollection of what had taken place.[28]

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[27]McDowell, R. 1188. See also Jacobi, R. 439-40, cross, R. 479.

[28]Govt. Ex. 376, R. 2977-8. The memorandum in full reads as follows:

"A committee at a previous Stabilization Meeting had been appointed of which Mr. Bob McDowell was Chairman to consider ways and means of establishing and maintaining an active and strong tank car market on gasoline.

"This committee rendered a report to the effect that a movement is under way which will take the East Texas surplus gasoline off the market so that it will not be a disturbing influence in the Standard of Indiana territory. It was stated that this East Texas gasoline would move to the Gulf and then go to either the East Coast or for export.

"A survey by the committee then indicated that the surplus gasoline, which would affect the Standard of Indiana territory only, amounted to 600 cars per month involving fifteen refining companies.

"A report is attached which lists the refineries in the Mid-Continent Field who will have surplus gasoline. This report shows their capacity, their crude runs, their allocation, etc.

"The program of the committee involves fourteen major companies, each selecting one or more of these fifteen small refining companies, and the major company obligating itself to take whatever surplus gasoline this small refining unit will have from time to time. In other words, a major company would select from among the fifteen small refineries some company whose surplus or distress gasoline it could advantageously move,

According to this memorandum, a program was proposed whereby each of the major companies would select an independent refiner whose surplus or distress gasoline it could advantageously move, and obligate itself to take such gasoline. (The memorandum shows that Mr. Sus

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and in that way by dividing up these fifteen companies and these estimated 600 cars per month of distress gasoline no great burden would fall upon anyone.

"A steering committee would guide and control, periodically, the prices to be paid for this surplus gasoline by the major company to the small refinery. There was considerable discussion to the effect that this new program had more chance of success than any previous program because of the way the steering committee would function and the fact that they would be buying on an ascending market, thereby keeping the market both active and strong, rather than buying on a descending market as previous buying movements had been and which previous movements had failed of any substantial success.

"It was estimated that the absorption of these 600 cars per month by fourteen major refiners would only be equivalent to curtailing their own crude runs 2 per cent. In other words, it was intended to point out that the absorption of this gasoline by a major would not seriously affect that major's own runs.

"Each purchase of a car, from time to time, by these majors of distress gasoline, would be recorded in the Journal of Commerce as an individual sale, and the number of these sales recorded would indicate an active market, and buying on an ascending market would tend to create a strong market.

"The meeting in question was attended by all of the major companies, including such companies as Globe, Skelly, Mid-Continent, etc., all of whom indicated a willingness to select one of the companies shown on the attached statement and assume responsibility for their surplus.

"The writer had no knowledge and did not participate in this discussion. Mr. Dippel, however, because of his knowledge of some of the purchasing we were doing in the West, tentatively stated that we might consider taking the output of, say, the Wilcox plant. Mr. Dippel indicated he would report this matter to Mr. Carnes and handle to a conclusion as to our participation in this movement."

used the words "surplus" and "distress" interchangeably.) In the course of the meeting all of the attending major companies indicated a willingness to select one of the independent refiners reported by the Committee to have distress gasoline and to assume responsibility for purchasing its distress.

The Sus memorandum contains the statement that the absorption of the estimated 600 cars of distress per month "by fourteen major refiners would only be equivalent to curtailing their own crude runs 2 per cent."

Sus testified that, in using this language, he was merely indicating by a comparison the small amount of distress gasoline which it was proposed should be purchased.[29] This interpretation is in accord with the fact that the record shows that, with the possible exception of one company, none of the respondents was able to produce in its own refinery sufficient gasoline to supply its needs, that others had refinery difficulties which restricted their capacity to produce and that still others produced at the full capacity of their plants[30] and in one case at a rate above the safe capacity.[31]

Also according to the Sus memorandum it was pointed out that the program would have a greater chance of success because of the functioning of a steering committee which "would guide and control periodically" the prices to be paid for this surplus gasoline by the major company to the small refiner. Sus testified that the function of the committee in this respect was to use its influence to see that the buying companies paid the going

[29]Sus, R. 1872.
[30]See pp. 231-9, *infra*.
[31]Kelly, cross, R. 841.

market rather than a distress price.[32] The actual activities of the Mechanical Sub-Committee, its efforts to secure the payment of the going market price by the buying companies, and the lack of uniformity of those prices are discussed in detail in later portions of this Appendix.[33]

The memorandum also states that each purchase from time to time would be recorded in the Chicago Journal of Commerce as an individual sale, so that the number of sales recorded, together with the fact that the buying would be done "on an ascending market" would tend to create a strong market.

In fact, the Journal of Commerce did carry news items which reported developments in the Mid-Continent buying program.[34] It does not appear that it ever reported the number of cars purchased under that program or the prices at which they were purchased. Even if it had done so, it could not have reflected such sales in its market quotations. The Journal's quotations, like the Oilgram's, were merely a quotation of the range of prices within which sales were being made. They did not record individual sales either to major companies, jobbers, consumers or brokers. Neither the number of sales nor the prices in individual sales were shown.[35]

The statement that buying would be "on an ascending market," insofar as it suggests that purchases should be made above the going market, is not borne out by the facts. The evidence showed and the Government conceded that the respondents did not pay higher than market

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[32]Sus. cross, R. 1870.

[33]See pp. 120-35, *infra*.

[34]McDowell, R. 1189.

[35]Beroth, R. 190. *Cf.* Govt. Ex. 730, R. 3200, a typical issue of the Oilgram.

prices in their purchases. In fact, it affirmatively appeared that their prices were lower than the market and that, if they had been reflected in the trade journals, the trade journal quotations would have been lower than they actually were.[36]

3. *Arnott's meeting with the independent refiners, March 1, 1935.*

On February 22, 1935 the Connally Bill, forbidding the interstate shipment of hot oil and hot gasoline, became law.[37] On February 25 or 26 McDowell, Ashton, and Bourque met with Arnott[38] and told him about the plan which they had evolved, and the committee's activities to date. Arnott stated that he thought the plan was practicable, and that since the Connally Bill had now been passed the only thing that remained was to have it enforced. He withheld his final approval, but said he would get in touch with them when the time arrived to put the plan into operation. He also told them that he had arranged to meet with the Mid-Continent independent refiners in Kansas City on March 1.[39]

The principal purpose of the Kansas City meeting was to find out whether the independent refiners were satisfied with the work of O'Shaughnessy and Majewski, their representatives in the stabilization efforts, and to consider matters relating to their refinery allocations under the Code.[40] As a result of this meeting the inde-

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[36]See pp. 131-5, *infra*.

[37]49 Stat. 30.

[38]McDowell, R. 1191; Arnott, R. 1701.

[39]Arnott, R. 1703. See Arnott's invitation to the meeting. Govt. Ex. 137, R. 2725.

[40]Arnott, R. 1703. See Arnott, R. 1693, 1694-5, 1697.

pendent refiners selected an "Executive Committee" under the chairmanship of C. M. Boggs of the Kanotex Refining Company to represent them in the General Stabilization meetings.[41]

In the course of the meeting, Arnott told the refiners that Majewski and O'Shaughnessy had presented their difficulties at the General Stabilization meeting on January 4th; that he had appointed a committee to study the situation and that the committee had made a recommendation. He said that he wanted to find out what the refiners thought of this recommendation, and asked Ashton, as Vice-Chairman of the Tank-Car Committee, to explain what it was.[42]

Ashton told the independent refiners essentially what he had told Arnott in Chicago on February 26. After some discussion the refiners expressed a desire to know more about the Tank-Car Stabilization Committee's recommendation. It was decided to have a meeting of the Tank-Car Committee in St. Louis on March 5th, and the independent refiners appointed another committee, also under the chairmanship of Boggs, to attend.[43]

4. *Meeting of March 5, 1935.*

The March 5th meeting was held at Ashton's office in St. Louis, and was attended by six or seven members of the committee.[44] Miskell of Empire and Van Eeghen

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[41]Def. Ex. 305, R. 2956; Arnott, cross, R. 1757-8.

[42]Arnott, R. 1704.

[43]Arnott, R. 1704-5, 1707; McDowell, R. 1192-3. The other two members of this committee were R. G. Cocanower, of the Olney Oil & Refining Co., and L. B. Simmons, of the Rock Island Refining Co. (*Ibid.*)

[44]McDowell, R. 1192-3; Jacobi, R. 362.

of Shell had now resigned and their places had been taken by their subordinates, the former defendant O. J. Tuttle and the respondent Lakin.[45] The meeting was also attended by the committee of independent refiners, and by R. Winget of the Cushing Refining Company who went along as an observer. Later in the morning W. P. Jacobi, the buyer for the Socony-Vacuum companies, arrived, having been invited by Ashton.[46]

McDowell turned the meeting over to Ashton, who explained how the meeting had come about, and the nature of his plan.[47] Several or all of the independent refiners then spoke, and tried to impress the members of the Tank-Car Committee with the seriousness of their situation, saying that they would be faced with bankruptcy unless something were done. Ashton replied that that was why the committee had been appointed.[48]

The independent refiners asked many questions. In answer to one of these McDowell explained that the plan would not prevent independent refiners from selling to brokers. It simply involved an effort to put buying companies in contact with independent refiners in the event that they had distress gasoline to sell. If they could sell their output through brokers, so much the better.[49]

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[45]McDowell, R. 1193. It will be recalled that Mr. Tuttle was already a member of the Mechanical Sub-Committee, having been appointed thereto on February 11th. See p. 92, *supra*. He was granted a new trial (R. 2491).

[46]McDowell, R. 1193; Jacobi, R. 362.

[47]Jacobi, cross, R. 475-7; McDowell, R. 1193.

[48]McDowell, R. 1193; Jacobi, R. 369, 371.

[49]McDowell, R. 1193-4.

One of the independent refiners asked what prices the majors were going to pay under the proposed program. McDowell described his question and the answer thereto as follows:

> "Some questions were asked by the independent refiners in respect to price. Mr. Simmons of Rock Island Refining Company asked a question about what price was going to be paid, and Mr. Ashton answered that this plan did not involve any price-fixing scheme at all, that there was no authority on the part of the committee to set any price, but that we were earnestly suggesting that the buying companies consider paying the fair going market price in the event they did make purchases from the independent refiners.
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> "Mr. Simmons said that he did not think that was much of an answer, that the price of gasoline was so low that he could not continue to operate very much longer unless something was done about it, and I think he spoke quite at length on the subject. Mr. Ashton simply told him that the plan did not involve anything of that sort, that the companies were going to make their own deals, and it would be up to the selling companies to get the best price they could from the companies that approached them for the purchase of the gasoline."[80]
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> • • •
>
> "Mr. Ashton also pointed out that the Tank Car Stabilization Committee suggested to the Sub-Committee that in their contacts with the field buyers—not all of the major companies had field buyers—but in their contacts with those that have field buyers, they should urge those field buyers to pay a fair going market price."[80a]

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[80] McDowell, R. 1194.

[80a] McDowell, R. 1195.

These were the only references made at the meeting to the prices which were to be paid.[50b]

The independent refiners were told that if the plan were put into operation, Bourque would inform the committee as to the availability and location of distress gasoline. They were asked to explain this to their group and to urge them to give Bourque accurate and honest figures. They were also told that the "Mechanical Sub-Committee" would act as a sort of clearing house for information as to the quantities of distress gasoline available. It was pointed out very definitely that all sales would be negotiated directly between the buying and selling companies, and that the sub-committee would simply distribute information.[51]

The independent refiners were also questioned as to their own situations, and it developed that at least two of them might find buyers among the members of the committee.[52]

[50b]Jacobi testified as follows:

"The only purpose of the plan that was discussed by Mr. Ashton and the other members of the major companies there was to remove this distress gasoline at fair prices." (Jacobi, R. 372.)

* * *

"* * * the only reference to prices at the March 5th meeting was the statement by Mr. Ashton or Mr. McDowell that the companies ought to be willing to pay a fair market price for the gasoline as contrasted with distress prices." (Jacobi, R. 376.)

* * *

"At the * * * meeting in Mr. Ashton's room, the price was mentioned, and it was felt by everyone that a fair market price for this distress gasoline should be paid." (Jacobi, R. 501.)

[51]McDowell, R. 1194-5.

[52]Jacobi, R. 372, 383. Jacobi thought that there was a general discussion of prospective dancing partners at this time, but McDowell put this at the afternoon session. (Jacobi, R. 367, 369, 371; McDowell, R. 1195, 1196.)

Ashton made a rather comprehensive statement as to the purpose of the program, saying that its primary purpose was to remove distress gasoline at a fair price so that the small refiners could operate on dollar crude and get more for their products.[83] It was also pointed out, however, that in helping the independent refiners by removing their distress gasoline, the major companies would be helping themselves because the elimination of distress gasoline would result in a stronger market.[84] Ashton also brought out that the purchasing was to be voluntary. The members of the committee would simply go back and call up the independent refiners whose gasoline they had indicated they might take, and they would find out what their problems were and what their specifications were, and make an honest attempt to work more closely with them. The committee was merely trying to get more coordination in the purchasing that would be going on anyway. Instead of purchasing haphazardly here and there, the buyers were to keep in touch with refiners who met their requirements as to specifications and location.[85]

Several of the independent refiners stated that they felt that the plan was encouraging, but that they were impatient for action and would like a more far-reaching plan. They were also disappointed because the Tank Car Committee, not yet having received word from Arnott, could not tell them when the plan was going into operation.[86]

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[83] Jacobi, R. 372.
[84] Jacobi, R. 376-9.
[85] Jacobi, R. 372-3.
[86] McDowell, R. 1195; Jacobi, R. 369.

The morning meeting adjourned about 12 o'clock. The Tank-Car Committee had lunch at the Coronado Hotel and continued the meeting, without the independent refiners, after lunch.[57] Ashton reviewed the happenings of the meeting of February 11, and described the general reaction of those present to the plan.[58] He also had a more recent survey, prepared by Bourque showing the refiners who would have surplus gasoline available during March, and he asked those present if they had developed any new or different ideas about their purchasing preferences. Several members of the committee indicated that their companies would prefer to buy from particular refiners on this list.[59]

Socony-Vacuum preferred the Champlin Refining Company; Continental would like to deal with the Shamrock Refining Company in order to secure freight savings, due to the location of the latter's plant; Empire wanted to buy from the Olney Refining Company, because Empire's Gainesville refinery had closed down permanently and Olney's location made it convenient from a freight standpoint (in fact Empire was already negotiating with Olney for the purchase of gasoline); Mid-Continent wanted to buy from the Johnson Oil Refining Company because they had sold it considerable amounts of crude and burning oils and had personal friends in the sales department, and from the Cushing Oil and Refining Company because they had previously bought gasoline from it, and its plant was located near Tulsa; Shell wanted to buy from Cushing, because of pleasant relationships in the past; Globe wanted

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[57]McDowell, R. 1195; Jacobi, R. 371, 380, 382.
[58]McDowell, R. 1195-6.
[59]McDowell, R. 1196.

to buy from Omar and Cushing, because both were situated near Blackwell, where Globe's refinery was shut down at the time.[60]

It was decided that the purchasing companies should contact their preferred sources of supply with a view to purchasing their distress gasoline, and all present indicated then they would try to work out their plans to permit such purchases.[61] No one said anything definite about the amount of gasoline he would purchase, although Jacobi mentioned that he had orders on hand and was going to buy about 40 cars from the Champlin Refining Company because he knew their product.[62]

The tentative arrangements just described did not take care of all the refiners on Ashton's list. Many independent refiners had not been spoken for at all, and at least 30 or 40 per cent of the distress gasoline had no prospect of finding a purchaser. Ashton asked the members of the committee to see if they could fit the others into the picture, and several men said that they would discuss it with their organizations. Ashton stated that he would get in touch with the buying companies not present at the meeting.[63] It was also suggested that more distress gasoline might come to light at some future time, and that it might be possible to interest other buying companies therein.[64]

Ashton also outlined the duties of the Sub-committee

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[60]McDowell, R. 1196-7; cross, R. 1220; Jacobi, R. 383.

[61]Jacobi, R. 371-2, 439-40; McDowell, R. 1197-8.

[62]Jacobi, R. 383; McDowel, R. 1197.

[63]Jacobi, R. 370, 383; McDowell, R. 1198.

[64]McDowell, R. 1198.

again.[65] As appointed at the February 11th meeting it had consisted of McDowell and Tuttle, who lived in Tulsa, and Ashton, ~~who~~ lived in St. Louis. Ashton now had Jacobi, who lived in Tulsa, substituted for himself so that the committee could work more smoothly.[66]

It was decided that if the program continued for any period of time the Tank-Car Committee should meet around the first of each month, so that the information shown by the surveys would be reasonably up to date and accurate. Since Arnott had not yet given his final approval to the plan, no date was set for the next meeting.[67] No one present, however, had raised any objection to the plan as it stood at this time, and Jacobi got the definite impression that they all approved it.[68]

E. The commencement of buying under the program.

The new Federal Tender Board under the Connally Act had been set up on March 1, and had issued its first tenders on March 4.[1] There was an immediate rise in the tank-car market. On March 1st the quotations for third grade in both the Oilgram and the Journal of Commerce, had been 3¼-3½¢. The next day the low quotation in the Oilgram had risen ⅛¢. One or more of the quotations rose each day thereafter until March 8. The Chicago Journal of Commerce was reporting a range of 3⅝-3¾ and Platt's Oilgram a range of 3⅝-3⅞¢.[2]

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[65]McDowell, R. 1198-9.
[66]McDowell, R. 1198; Jacobi, R. 382.
[67]McDowell, R. 1199.
[68]Jacobi, R. 384.
[1]McDowell, R. 1199; Van Covern, R. 1512.
[2]McDowell, R. 1201. See Def. Ex. 1024, R. 3807.

At the same time, as shown in the next section, there was a movement on foot among the East Texas refiners which promised to furnish an outlet for their legal distress gasoline.[2a]

As yet no purchases under the program had been made. On March 6 Ashton telephoned Arnott, and told him what had been accomplished at St. Louis the day before. Later in the day Arnott called Ashton back and told him that since the Federal Tender Board seemed to be cleaning up the hot oil situation in East Texas, the plan should be put into operation as soon as possible.[3] Ashton immediately telegraphed Arnott's instructions to McDowell, and the next morning McDowell called up Tuttle and Jacobi and arranged to have a meeting of the sub-committee at lunchtime.[4]

The meeting was very brief. McDowell felt that the first thing to do was to telephone the companies which had indicated that they might purchase gasoline. He undertook to call Phillips, Barnsdall and Standard of Indiana. Jacobi said that he would call Shell, Globe, Sinclair and Pure. Tuttle was to call Skelly and Continental.[5] McDowell gave them no specific message except that Arnott wanted the plan put into operation, and that if the companies needed gasoline they should put their field men in touch with the independent refiners from whom they desired to buy.[6]

After the meeting McDowell, Tuttle, Jacobi and

[2a]See pp. 143-84, *infra*; Def. Ex. 69, R. 2653, 2656.
[3]Arnott, R. 1706.
[4]McDowell, R. 1199-1200.
[5]Jacobi, R. 384; McDowell, R. 1200.
[6]McDowell, R. 1200.

Bourque made a final survey to determine the amount of distress gasoline which would have to be moved during the month, and found that it would amount to some 600 or 800 cars.[7] They then proceeded to call up the purchasing companies.

McDowell telephoned Bullock of Standard, Hughes of Phillips, and Evans of Barnsdall, stating that Arnott had instructed them to put the plan into operation and expressing the hope that if they needed gasoline they would put their field representative in contact with the independent refiners from whom they preferred to buy.[8] Bullock merely thanked McDowell for the information, without saying what he was going to do. Hughes discussed general market conditions. Evans, however, was not a member of the Tank-Car Committee, and had to have the plan explained in some detail. McDowell also told him about the sub-committee, said that he would be calling from time to time, and indicated the name of an independent refiner from whom Barnsdall might be able to buy gasoline. Evans said that Barnsdall would have to buy anyway and that he would appreciate receiving this information.[9]

About the same time or shortly thereafter Jacobi contacted D. K. Chamberlain of Pure, Lakin of Shell, and O'Shaughnessy of Globe. Lakin and O'Shaughnessy, being members of the Tank-Car Committee, knew all about the plan.[10] Chamberlain told him that he had not yet heard about it, but that he would contact his Chicago office.[11] On March 14, Jacobi called W. A. Tracey of Sinclair describ-

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[7]Jacobi, R. 384, 386, 388, 399.
[8]McDowell, R. 1201-2.
[9]Evans, R. 515, 516, 517; McDowell, R. 1201-2.
[10]McDowell, R. 1169; Arnott, R. 1696-7; see pp. 79, 99, *supra*.
[11]Jacobi, R. 391, 395; cross, R. 490.

ing the plan, and mentioning a small refiner from whom Sinclair might buy. Tracey said that he had not heard of the St. Louis meeting, but that he would no doubt hear from his superiors about it and that he believed they would be doing some purchasing.[12]

The major companies alleged to have participated in the program (excluding Sinclair) purchased some 546 tank-cars during March.[13] As the plan progressed, more and more independent refiners called up and wanted to move their distress gasoline.[14] Before the month was out distress gasoline had been bought from all the independent refiners named in Paragraph 22 of the indictment except Taxman, Wilcox and Dickey.[15]

F. The Mid-Continent Buying Program in operation.

It had been suggested at the March 5th meeting at St. Louis that it would be a good thing if the program could be more or less permanent. It was finally decided, however, to try it for a month only with the hope of continuing. There never was any specific agreement to continue the program; it merely went on from month to month as the purchasing companies found that they could use the gasoline.[1]

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[12] Jacobi, R. 392, 393. Both Chamberlain and Tracey apparently did hear from their superiors, for they both knew about the plan later in the month. (Jacobi, R. 394-5.)

[13] Govt. Ex. 747, R. 3270. All the companies alleged to have participated in the program bought except Deep Rock.

[14] Jacobi, R. 387.

[15] Jacobi, R. 389. See Indictment, R. 15.

[1] Jacobi, R. 382-3, 441-2. In a speech before the District Allocators on March 13th, Arnott had stressed the desirability of regular purchasing continuing from month to month (Def. Ex. 69, R. 2653, 2656). As shown by the text, however, the plan never was set up on a permanent basis.

1. *Participants in the program.*

It is alleged in the indictment that Standard of Indiana, Socony-Vacuum, Wadhams, Sinclair, Shell, Empire, Pure, Phillips, Mid-Continent, Continental, Skelly, Barnsdall, Globe, and Deep Rock made purchases in the Mid-Continent field pursuant to the program, and that they purchased from fourteen independent refiners named in the indictment, most of whom were members of the Western Petroleum Refiners' Association.[2]

At the close of the Government's case the court dismissed the indictment as to Deep Rock, it appearing that a trustee appointed under Section 77(b) of the Bankruptcy Act proceedings had been in control of the policies of the company throughout the indictment period.[3] After the verdict, the court dismissed the indictment as to Globe of Kansas on the ground that the evidence was insufficient to support a conviction,[4] and granted new trials to Standard of Indiana and Barnsdall.[5] The record shows that all of the companies named above had made purchases in the Mid-Continent field during the indictment period,[6] and that purchases had been made from all the independent refiners named in the indictment.[7]

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[2]Indictment, paragraph 22, R. 15.

[3]R. 902, 903.

[4]R. 2490.

[5]R. 2491.

[6]Govt. Exs. 747, R. 3270-1; 750, R. 3276-7; 751, R. 3278-80; and Def. Ex. 1015, R. 3797. (The last-named exhibit, expressing the total bought by Sinclair in gallons, has been translated into tank-cars at the rate of 8,000 gallons to a tank-car.) The figures in these exhibits, of course, do not imply that the purchases would not have been made anyway, even in the absence of a buying program. The evidence on this point is discussed at pp. 231-9, *infra*.

[7]Jacobi, R. 387.

The record does not show how many of the purchases from these refiners were made as a result of the program.

The record also shows that all of the independent refiners named in the indictment were members of the Western Petroleum Refiners' Association.[8] There was no evidence that the Association itself participated in the program. C. M. Boggs, the president of the Association, and A. V. Bourque, its secretary, were named in the indictment as defendants.[9] Both of them were dismissed by order of the Court.[10]

There were also substantial purchases from refiners not named in the indictment. Sinclair purchased 3,324 tank-cars, or 53 per cent of its total purchases, from refiners not named in the indictment.[11] Globe made about 50 per cent of its purchases from such refiners.[12]

It also appears that refiners and even brokers not named in the indictment sometimes asked the Mechanical Sub-Committee to find customers for their distress gasoline, and that in a few cases the sub-committee was able to do so.[13] The exact extent of the purchases made from such refiners and brokers at the suggestion of the committee does not appear in the record.

2. *Monthly meetings of the Tank-Car Stabilization Committee.*

Each month from April, 1935, through February, 1936, there was a meeting of the Tank-Car Stabilization Com-

[8]Jacobi, R. 427; Gray, R. 1828.
[9]Indictment, paragraph 4, R. 5.
[10]R. 2477, 2490.
[11]Def. Ex. 1015, R. 3797.
[12]Def. Ex. 1002, R. 3767; J. D. Miller, R. 1613-4.
[13]Jacobi, R. 388, 427, 428; see Govt. Ex. 516, R. 3019.

mittee.[1] The purpose of these meetings was to analyze the surveys of distress gasoline, which Bourque (with the assistance of Jacobi) prepared around the first of each month.[2] These surveys usually showed that from six to eight hundred cars of distress gasoline would become available during the month.[3] Some purchasing companies' representatives would indicate that their companies could take certain amounts; others, that they would have to check the quality; and so on.[4]

The evidence indicates that the gasoline taken by the various companies represented undertakings or "obligations" assumed at the committee meetings, based upon the actual needs of the companies represented. As McDowell testified:

> "Here is the situation on what I mean by companies needing gasoline. A company doing business in large quantities as we do has to project their requirements beyond a week or ten days. And we often times buy gasoline that may not actually be sold out of the bulk plant for some little time, but we have to project for stock levels throughout the period of the year. It would depend on the individual policies and ideas of the various companies.
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> "In January or February, 1935, we knew that we were going to have to buy gasoline that year.

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[1]Jacobi, R. 397; McDowell, R. 1207-8. For a detailed statement of the times and places of the various meetings, see Jacobi, R. 399-400. For a detailed statement regarding the attendance, see Jacobi, R. 398-400.

[2]Jacobi, R. 397, 399.

[3]Jacobi, R. 400.

[4]Jacobi, R. 442.

It was on the basis of the major companies needing gasoline that we assumed they could and would buy. The plan was that we weren't going to ask them to buy anything they didn't need."[5]

Jacobi testified to the same effect, as follows:

"The amount taken was not determined • • • upon the size of the company, its financial size. It was the amount of gasoline that they wanted to take and needed at that time. • • • That was what determined the allocation, and the size of the company had nothing to do with it.

• • • •

"Those companies represented at the meetings spoke for that part of the total of gasoline that they felt they could use and wanted. The quantities that the various companies took depended upon their requirements and what they wanted. There was no other method of determining the amount which they were to purchase. That was the only method. They said what they wanted, and they knew what their business was and how much they needed and how much they could use • • •.

• • • •

"I could judge pretty accurately from my experience down there about how much gasoline I could take during that month. We have a refinery in Kansas. The monthly output or capacity of that refinery was about 14,000 barrels a day. We also have a refinery at East Chicago, Indiana, having the capacity of about 11,000 barrels a day. I know the requirements of our company per day. I was in touch with our various offices and knew

[5]McDowell, R. 1221.

from month to month approximately what their requirements would be, and I have always done that."[6]

At the same time that the committee members indicated how much distress gasoline they could take, they indicated the independent refiners from whom they would prefer to purchase it.[7]

The indictment charges that the independent refiners were "assigned" to the defendants as "dancing partners".[8]

The term "dancing partner", of course, was derived from the simile of the "economic ball" which Ashton had used at the February 11th meeting. The independent refiners having distress gasoline were "wallflowers"; the major companies were "strong dancers". The committee was supposed to bring them together.[9] As the program went along, most of the majors continued to buy from the same independent refiners with which they had started,[10] and the latter came to be known as their "dancing partners."[11]

Socony-Vacuum, through Jacobi, bought rather regularly from its "dancing partners". It also bought from a number of other refiners. The other purchasers bought from their "dancing partners" with varying degrees of regularity.[12] McDowell testified that Mid-Continent and others bought from "dozens of independent refiners".[13]

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[6]Jacobi, R. 433, 434-5.
[7]Jacobi, R. 397.
[8]Indictment, paragraph 23, R. 15.
[9]See pp. 92-3, *supra*.
[10]Jacobi, R. 397, 440.
[11]Jacobi, R. 439-40; cross, R. 479.
[12]Jacobi, R. 440, 462.
[13]McDowell, cross, R. 1220.

Independent refiners were not "assigned" to the major companies whose representatives attended the monthly meetings. Instead, as the schedule of refiners having distress gasoline was read off, the committee members selected the refiners from whom they would prefer to buy and undertook to take care of their distress gasoline.[14]

3. Contacts of the Mechanical Sub-Committee with companies not represented on the Tank-Car Committee.

After each meeting the members of the Mechanical Sub-Committee contacted the purchasing companies which were not represented on the Tank-Car Committee (Sinclair, Pure, Barnsdall and Skelly) and asked them if they could use any part of the gasoline which had not been spoken for at the meeting.[1] Jacobi (who contacted Sinclair and Pure) described these conversations as follows:

> "* * * I talked to Mr. Tracey occasionally about what transpired in the meetings, and told him in a general way what had happened. * * * I made a note of what gasoline had been mentioned at the meeting that Sinclair might be interested in; and passed that information on to Mr. Tracey. I called him after most of the meetings. I may have called him after each one.
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> * * * *
>
> "I mentioned the particular companies that had the gasoline. I told him the quantity and told him

[14] Jacobi, R. 369, 383, 439, 440.
[1] Jacobi, R. 432, 452.

to buy it if he could. I don't remember the quantities now; there might have been 2 or 3 different small refiners. I think on some occasions he asked me what the others were going to do. If he asked me I told him.

• • • •

"I am sure that after some of these meetings I called up Mr. Chamberlain of Pure and told him what transpired at the meetings. On those occasions, I told him that we had had a meeting and that certain things transpired—I don't remember what they were—that the companies had had their representatives there, and the meeting was at such and such a place, and that it was felt that his company could probably use a certain quantity of gasoline from so and so and so and so, and suggested that they buy it if they could. And Mr. Evans—or, Mr. Chamberlain's usual reply was, 'Well, I will check it up and see.' • • •"[2]

Evans of Barnsdall (who was contacted by McDowell) testified as follows:

"• • • I heard from him every month for a while when he was in town, I should say. I did not call him or discuss the market with him very often. Probably 2 or 3 times a year. I wouldn't want to say he called me every month. On these calls he would suggest gasoline available from certain refineries, and that is about all there was to it • • •.

• • • •

"I don't recall Mr. McDowell ever suggesting a definite amount to be purchased.

• • • •

"Mr. McDowell may have mentioned the name of a company in connection with the term 'danc-

[2]Jacobi, R. 445, 451.

ing partner.' He probably did use the term. He never told me I was to buy from anyone. His were merely suggestions.

* * * * *

"Mr. McDowell may have suggested that we take some more, after we had all we could take, or all we wanted. I don't remember that he urged it. A suggestion from him wasn't an urge. We had many chances to purchase gasoline which we did not do, when we had already covered our requirements * * *."[3]

The former defendant, O. J. Tuttle of Empire, was the member of the Mechanical Sub-Committee who was in contact with the Skelly Company with respect to its purchasing distress gasoline.[4] Skelly representatives seem to have interpreted his suggestions as "assignments" of definite refiners and definite "quotas" of gasoline. Thus, on August 27, 1935, the former defendant J. F. Nagle of Skelly wrote L. H. Poland of the same company, as follows:[5]

"We are purchasing today from Rock Island Refining Company, Duncan, Oklahoma, 10 cars of Powermax (Purchase Order No. 187914) and 10 cars of 70 octane Aromax (Purchase Order No. 187915), these purchases being made in connection with the inter-refinery buying program which is still in effect, the Rock Island outfit being one of the babies placed in our lap last spring when this thing was inaugurated."

On October 17, 1935, he wrote Poland again as follows:[6]

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[3]Evans, R. 529, 544, 546.
[4]Jacobi, R. 392; McDowell, R. 1200.
[5]Govt. Ex. 122, R. 2720.
[6]Govt. Ex. 124, R. 2722.

"As you probably know, we don't have much choice as to whose material we are to take, when we purchase outside third grade gasoline in connection with the Buying Program Committee's operations. On such purchases, we have refineries 'assigned' to us, and, as you might expect, such refineries are small outfits who just make motor gasoline, and don't make any effort at all to make their product suitable for use in pressure gas appliances. Even if we did have some choice, it wouldn't do us much good because, as far as making an extra fine product suitable for this special use is concerned, they just wouldn't be interested, for they aren't that kind of refiners. Now, that goes for most of our Oklahoma refiners, and, with that being true, what can you expect from outfits in the Panhandle and North Texas, to say nothing of East Texas with all its fly-by-night outfits? You probably know that, out of about twelve to fifteen first class or good refiners here in Oklahoma, only six are on the approved list of United for Oklahoma, such concerns as Barnsdall, Phillips, Sinclair, and Tidal being among the missing. Their products might pass muster with United, but they aren't on the list that I have."

On January 8, 1936, Nagle wrote to W. T. Atkins, a vice-president of the company, saying: "I was under the impression that I had given you the line-up on our purchase obligations for January, under the Buying Program as they were given to me by Mr. Tuttle, of Empire, about two weeks ago. * * *"[7]

On January 21, 1936, A. H. Pendergrass, supervisor

[7] Govt. Ex. 101, R. 2702.

of Skelly's tank-car order desk, wrote Clara Gartman, its tank-car purchasing agent, regarding the purchase of ten cars of gasoline from Russell Refining Company, Russell, Kansas. Pendergrass noted that, "These ten cars will no doubt be credited against our January quota for outside gasoline for the month of January."[8]

Again on December 21, 1935, Nagle wrote Poland that certain purchases, "* * * being made because of freight savings effected, are not credited to us by the Buying Program Committee handling inter-refinery purchases."[9] On November 5, 1935, Poland wrote Nagle stating that he realized "that under this buying program, we can't always do what we want to."[10] On December 20, 1935, he wrote E. F. Underwood, the manager of wholesale sales, saying, "I realize we are probably committed to buy from certain people such as Ben Taxman at Chase and other refineries in Texas or Oklahoma in connection with the buying program."[11] Atkins, who received a copy of this letter, agreed that "we are committed to take a certain volume at Chase, Kansas, each month."[12]

In reporting Skelly's purchases Clara Gartman, its tank-car purchasing agent, almost invariably stated that "These purchases are to be credited to Skelly Oil Company on the inter-refinery buying agreement."[13]

Skelly's files also contained a number of letters showing that these "assignments" imposed some hardship on Skelly. The quality of the distress gasoline purchased was

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[8]Govt. Ex. 98, R. 2701.
[9]Govt. Ex. 126, R. 2723.
[10]Govt. Ex. 99, R. 2701.
[11]Govt. Ex. 125, R. 2723.
[12]Govt. Ex. 127, letter dated December 23, 1935, R. 2724.
[13]Govt. Exs. 112-117, R. 2713-5.

sometimes poor.[14] The independent refiners were lax at times about making deliveries.[15] And Skelly, like Phillips and Wadhams, had to modify existing purchase and exchange arrangements in order to make room for the distress gasoline.[16] On one occasion, at least, it abandoned purchases which netted it substantial freight savings.[17]

The record also shows, however, that Skelly felt that under the agreement it had the right to select the independent refiners from whom it would buy and to refuse to buy from any given refiner if it saw fit. The same letter[18] which stated that Skelly had refineries assigned to it contains the following language:

> "Does United [Laboratories] prescribe any particular set of specifications, by which we might be guided in buying our outside third grade gasoline? If they do, then, of course, we can scout the market and find out who, among the small refiners whose surplus is moved through the committee's activities, makes a product meeting such specifications, and then tell the committee that we will take our monthly 'allocation' from them instead of from Wilcox, or Taxman, or Panhandle, or some of the other jacklegs whose stuff won't pass muster."

Similarly, on November 20, 1935, Nagle wrote L. H. Poland, the manager of Skelly's retail stocks department, complaining about the quality of a shipment received from Waggoner Refining Company, and saying:

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[14]Govt. Exs. 99, 100, and 122, 124, R. 2701, 2702, and 2720, 2722.

[15]Govt. Ex. 121, R. 2719.

[16]Govt. Exs. 96 and 95, R. 2699.

[17]Govt. Ex. 96, R. 2699.

[18]Govt. Ex. 124, R. 2722.

> "If * * * these outside refiners ship off-specification material, about the only thing we can do is refuse to take any of their stuff when the Buying Program Committee tell us they have to move some, or to turn the refiner down completely when and if he has the nerve to call us up and solicit some business after such an instance."[19]

4. *The work of the Mechanical Sub-Committee between meetings of the Tank-Car Committee.*

The Mechanical Sub-Committee (composed of McDowell, Tuttle and Jacobi) kept in close touch both with the independent refiners and the major companies, asking the former questions as to the amount of distress gasoline they had, and furnishing the information so obtained to the latter.[1] Jacobi also kept in constant touch with Bourque over the telephone,[2] and reported to him all distress gasoline which came to his attention and which had not appeared in the surveys submitted to the monthly meetings but which turned up unexpectedly between meetings, and which he couldn't buy or dispose of himself.[3]

Between meetings of the Tank-Car Committee, the members of the sub-committee frequently called the purchasing companies to see if they could purchase new distress gasoline which had come to light unexpectedly or which could not be purchased by the company originally undertaking to purchase it.[4] McDowell described a typical conversation with a purchasing company as follows:

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[19]Govt. Ex. 100, R. 2702.

[1]Jacobi, R. 395; McDowell, R. 1206.

[2]Jacobi, R. 389.

[3]Jacobi, R. 399, 428-9.

[4]McDowell, R. 1206. See also Evans, R. 527; Jacobi, R. 395, 454-5.

"• • • After arriving in my own mind as to who would be a most logical purchaser—and many times I was mistaken—I would call this company and say, 'Well, are you buying any gasoline? Do you need any more gasoline this week'?

"Maybe they would say yes, or maybe they would say no, or maybe they would say they didn't know. But, regardless of their answer, I would say, 'Well, so-and-so'—being an independent refiner—'has ten or fifteen or twenty cars of gasoline he would like to sell the balance of this month,' or whenever he needed to sell it, if I knew. And I would say, 'If you can fit this in with your needs, why, I know this fellow will appreciate it if you will get in contact with him.'

"Sometimes the party to whom I was talking would say, 'Well, we do need some additional gasoline, and we will get in touch with this concern.' Other times, they would say, 'Well, I don't know; I will have to check it up with the fellows that are doing the buying.' I usually talked to men who weren't doing the actual, routine buying. On many occasions they would say, 'Well, I happen to know that we are not in the market at the present time for any more gasoline.' Then I would have to put in some more phone calls."[5]

When McDowell and Tuttle were out of town Jacobi had to keep in touch with the major companies which had been assigned to them[6] and ask them if they could take any of the distress gasoline which cropped up between surveys. In this he had the assistance of McDowell's substitute,

[5] *Ibid.*

[6] Jacobi, R. 432; Evans, R. 526.

Fitzgerald,[7] a former defendant, dismissed at the close of the case.[8]

5. *Prices paid.*

(a) Efforts to assure payment of going market price.

It was one of the principal features of the original plan that, in making purchases of distress gasoline, the defendants would pay the going market price and would refrain from taking advantage of their knowledge of the necessities of the small independent refiners to beat down the price to the lowest possible level.[1] In his memorandum describing the meeting of February 11, 1935,[2] Sus of Sinclair stated that it was understood that a steering committee (the Mechanical Sub-Committee) was to "guide and control" the price to be paid independent refiners.

McDowell and Sus explained this latter feature of the plan as follows:

McDowell said:

> "Mr. Ashton gave further reasons why he thought the previous purchasing had not been helpful. He stated that he also felt that some of the major companies, at least, had allowed their field buyers to chisel on the sellers and take advantage of their economic distress because they needed to sell gasoline, which drove the market

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[7]Jacobi, R. 392-3, 445, 450, 451-2, 454. Jacobi also had a number of general conversations with representatives of the purchasing companies, Evans of Phillips (Jacobi, R. 393), Clara Gartman of Skelly (Jacobi, R. 392-3), Cramer of Continental (Jacobi, R. 432), Smith of Standard of Indiana (Jacobi, R. 391, 454), and Kennedy of Continental (Jacobi, R. 454).

[8]R. 2477.

[1]McDowel, R. 1183, 1184, 1188, 1194.

[2]Govt. Ex. 376, R. 2977.

down further under an already distressed price. He said he felt that the major companies should consider being willing to pay a fair going market price, rather than chiseling on the small refiners.[3]

* * * *

"* * * Mr. Ashton covered the duties, as he saw them, again stating that the Sub-committee would be down there in the field close to the information that would arise from time to time; that it would be its duty to pass on information as to the availability of this distress gasoline to the buying companies; that when additional distress gasoline showed up, which had not been on the survey, the Sub-committee would try to find somebody who was interested in buying it; and that the Sub-committee in its contacts with the buying representatives in the field would urge that they pay a fair going market price in these transactions."[4]

Sus testified:

"This steering committee was also to keep itself informed as to the price at which gasoline was currently moving. They were to use such persuasion and such influence as lay at their command and to see to it that these major buying refiners did not take advantage of these smaller selling refiners, and, by reason of the economic distress of these smaller refiners, bid down the price to below the current levels at which gasoline was selling, because to do so would have defeated the very purpose of the meeting, which was to stabilize. This steering committee was to see to it that these major refiners played fair with these smaller refiners who were in economic distress, and didn't

[3]McDowel, R. 1183.
[4]McDowell, R. 1199.

chisel under the going market on the price at which they bought this gasoline. The only reference that was made at the meeting to the price to be paid was that they wanted these refiners who bought gasoline from these refiners who had distress gasoline to pay the going market price and not chisel.''[6]

What actually happened when the program commenced operating was this:

During the first week of the program two of the independent refiners complained to Jacobi that major company buyers were trying to beat the sellers down below the fair going market price.[7] Jacobi felt that this might result in driving the market down because jobbers might hear of such prices through trade journal comment and hold off buying, while the independent refiners, on the other hand, would become discouraged and accept lower prices from jobbers.[8]

During this same week, Jacobi learned of some additional distress gasoline which had not appeared on the survey. He mentioned this to McDowell on March 14th, and the latter called a luncheon conference of the subcommittee at the Tulsa Club.[10] The principal subject of discussion was the additional distress gasoline. Suggestions were made as to various major companies which might be interested in it, and arrangements were made to get in touch with them.[11]

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[6]Sus, cross, R. 1870.
[7]Jacobi, R. 401-2; McDowell, R. 1203.
[8]Jacobi, R. 402.
[10]McDowell, R. 1202-3.
[11]McDowell, R. 1203.

Jacobi then reported the complaints of "chiseling" which he had received from the independent refiners, and the members of the sub-committee discussed the possibility that these practices might adversely affect the published quotations in the market journals.[12] McDowell thought that the purchasers had acted wrongly and that such attempts to chisel should be discouraged. He thought that where a specific instance like this was called to the sub-committee's attention they should use their influence to get the buyers to pay a fair market price. They had no authority to go further, and if the buyer really wanted to pay a lower price the seller would have to take care of himself.[13]

The members of the sub-committee also discussed the current state of the gasoline market. Being constantly in the market, they had a pretty good idea of what jobbers and consumers were paying on the spot market.[14] The sub-committee members exchanged their information, and decided that the going market price for regular gasoline was 4¾ cents, with 3¾ cents for third grade with a possibility that the market might go on to higher levels.[15]

Jacobi believed that he should "recommend" a fair going market price to the purchasing companies with which he was in contact.[16] Accordingly, he telephoned Tracey of Sinclair, Chamberlain of Pure, O'Shaughnessy of Globe, and Lakin of Shell, and told them that the smaller companies had reported attempts by major companies to beat the price down. He then told them of the conclusion the

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[12]Jacobi, R. 401-7.

[13]McDowell, R. 1203.

[14]Jacobi, redirect, R. 501; McDowell, R. 1203.

[15]Jacobi, R. 409; McDowell, R. 1203-4. See Govt. Ex. 682, R. 3112; Jacobi, R. 469.

[16]Jacobi, R. 410.

sub-committee had reached as to what would probably be the fair going market price during the next week, and recommended that the purchasing companies pay it.[17]

Similar discussions of the market situation occurred at each of the five or seven meetings of the sub-committee between March 14 and June 1, 1935, and each time, when Jacobi called up Tracey, Chamberlain, and the Globe and Shell offices after the meeting, he told them that he was paying a certain price, or was going to do so next week, and recommended that they do the same if they could,[18] Tracey usually replied that he would see what he could do, or that he would have to check.[19] Chamberlain usually said that he would have to check with his superior (McElroy). He never indicated that he would pay the price.[20] O'Shaughnessy usually said, "Fine," or words to that effect.[21]

In his own mind, Jacobi certainly thought that he was recommending the payment of the fair going market price as determined by the sub-committee. For instance, in the weekly market letter which he sent A. G. Maguire and other superiors in Socony-Vacuum, on March 15th he wrote as follows:[22]

> "The writer has been busy this week on Tank Car Stabilization work, and thus far results are gratifying. Our Committee decided on a price of 3¾¢ for third grade, and 4¾¢ for 'Q' for next

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[17] Jacobi, R. 409, 410.

[18] Jacobi, R. 410, 413, 415, 431.

[19] Jacobi, R. 413.

[20] Jacobi, R. 413; cross, R. 490.

[21] Jacobi, R. 415.

[22] Govt. Ex. 682, R. 3112; Jacobi, R. 469. The "Q" mentioned in the letter refers to "Q gasoline", a synonym for regular gasoline (*Ibid.*)

week. Purchasing companies, including our own units, are paying these prices today."

In passing this price information along to the purchasing companies, however, he did not describe it as a recommendation of the sub-committee, but only as his own idea of what the fair market price was.[23] Nor did he ever follow up to see if the purchasing companies were in fact paying the prices he had recommended, for he understood that the price was to be worked out by the buyer and seller in each instance.[24] Once or twice he did ask Tracey, O'Shaughnessy, *et al.*, whether they were paying the recommended prices, but he did not know what the reply was.[25] Occasionally, too, he would learn from independent refiners the prices which the majors were paying. Sometimes these were the same as the prices he himself was paying; sometimes they were different[26]

Jacobi never knew whether the other members of the sub-committee were recommending prices or not.[27] Nor did he ever presume to recommend prices when McDowell and Tuttle were out of town and he had to contact the companies assigned to them.[28] He did not even know what prices they were paying for their own companies.[29]

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[23]Jacobi, R. 410.
[24]Jacobi, R. 410-1.
[25]Jacobi, R. 412.
[26]Jacobi, R. 410, 411.
[27]Jacobi, R. 412, 422.
[28]Jacobi, R. 431-2, 445, 450, 451; Evans, R. 526, 527.
[29]Jacobi, R. 420-1. Jacobi once asked McDowell whether Mid-Continent was paying what they had decided was the fair going market price. McDowell replied that in some instances he was paying it and in others he wasn't, depending upon the deal he could make with the selling refiner. *Ibid.*

McDowell, the other sub-committee member who testified, had taken a totally different view of the matter. He had shared Jacobi and Tuttle's view that 3¾ cents represented the fair going market price for gasoline on March 14th, but he had neither ordered, nor urged, nor recommended, nor suggested that any purchasing company pay that price.[30] Evans, of Barnsdall, who was contacted regularly by McDowell, and who was the only person so contacted to take the stand, testified that he had never received a price recommendation or suggestion from any member of the sub-committee.[31] If McDowell were asked, he would tell the purchasing companies what his own company was paying for gasoline.[32]

As a matter of fact, there were wide variations in the prices paid by different major companies purchasing on the same day. During the 67 business days when Jacobi was making price recommendations there were 55 days when more than one major company purchased on the same day. On 40 (or 72.7%) of those days they paid two or more different prices; on 9 they paid three

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[30]McDowell, R. 1204.

[31]Evans, R. 527, 528, 529, 530.

[32]Evans, R. 529; McDowell, R. 1204. For instance, after the March 14 meeting, McDowell called Hughes with reference to the additional distress gasoline. Hughes didn't say definitely whether he would buy or not, but he did say that they had been having to buy quite a lot of gasoline, that the market looked strong, and that he was very optimistic. McDowell asked him what he had been paying and Hughes replied that he had been paying either 3⅞c. or 4c. In response to a similar question from Hughes, McDowell reported that his company had just made a purchase at 3¾c. (McDowell, R. 1204-5.)

or more different prices; and on one day they paid four different prices.[33]

The prices which Jacobi "recommended" were never higher than the prices he himself was paying,[34] and, as shown by Exhibit 712, the prices which Jacobi paid were never higher than the trade paper quotations.[35] In all but two cases, they were at or below the lowest quotations published by Platt's Oilgram; and on all but three occasions they were at or below the lowest quotations published by the Chicago Journal of Commerce.[36] An examination of Exhibit 1024 shows that those prices were also lower than the prices then being paid by jobbers and consumers on the spot market.[37]

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[33]Def. Exs. 874, R. 3457; 875, R. 3458; 876, R. 3459; 877, R. 3460; J. D. Miller, R. 1558-66.

[34]Jacobi, cross, R. 479.

[35]Def. Exs. 712 and 713, R. 3173 and 3177. At one point in his testimony, Jacobi seemed to think that the prices which he recommended were sometimes above the prices currently being paid by jobbers as reported in the trade journals at the time the Sub-Committee met. (Jacobi, R. 412, 417, 431.) The evidence described in the text and in footnote 37, *infra*, however, completely rebutted this inference.

[36]*Ibid.*

[37]Def. Ex. 1024, R. 3807. When he Sub-Committee met on March 14th the lowest quotations carried by the journals had, as noted, been 3¾c for the preceding three days. During the week of the 17th (when the "recommended" price was supposed to be in effect) the range of the quotations in Platt's Oilgram and the Chicago Journal of Commerce rose to 3⅞-4c and 3⅞-4⅛c respectively and later in the week to 4-4⅛c. During the week of the 10th, jobbers and consumers had paid as low as 3⅝c and as high as 4⅛c for third grade gasoline, with a number of sales taking place at 3¾c and 3⅞c. During the week of the 17th, the bulk of the sales took place at 3⅞c, with several at 4c and 4⅛c. On only one occasion during this week did a jobber or consumer pay as low as 3¾c for third grade gasoline. In regard to the recommendation

Jacobi discontinued the practice of "recommending a prevailing market price for gasoline on June 1, 1935. The only exception occurred in January, 1936.[39] On January 9 the price of crude oil had advanced from $1.0 per barrel to $1.15 in East Texas and $1.10 in the Mid Continent.[40] Since the price of crude oil is one elemen fixing the price of gasoline, such advances are usually accompanied by a rise in the tank-car market,[41] the latter usually rising about ¼ cent for each 5 cents advance in crude oil.[42] The crude advance caused quite a little excitement and comment in the industry. A number of independent refiners began asking half a cent more for their gasoline. Jacobi called McDowell and Tuttle, who told him that their companies were raising the price on the gasoline which they sold on the spot market. His own company also inquired about the market, and on January 13 he raised the price he was paying by ½ cent. Without further consultation, Jacobi then called the four companies which he usually kept posted, and told them that the refiners were asking for an additional ½ cent—that he personally was going to pay it and that he hoped they would too.[43]

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that the defendants pay a price of 4¾c for regular, it appears that at the time this recommendation was adopted it was the average of the highest and lowest quotations for this grade of gasoline and that during the preceding month, jobbers had been making many purchases at this price and at prices ⅛ to ¼c higher. During the week of the 17th only one purchase was made by jobbers and consumers at 4¾c, but there were several purchases made at higher prices. (*Ibid.*)

[38] Jacobi, R. 413, 416.

[39] Jacoib, R. 411.

[40] Jacobi R. 487-8.

[41] Jacobi, cross, R. 487-8.

[42] *Ibid.*

[43] Jacobi, R. 59; cross, R. 488.

(b) The prices actually paid.

Both the Government and the respondents introduced tabulations which showed that from 85 to 90 per cent of the major company purchases from independent refiners had been made at prices which were *at or below* the low quotations in the market journals.

The Government's tabulations[45] dealt with 9,204 tank-cars which the defendant companies, excluding Sinclair, had purchased on a flat price basis from independent refiners in the Mid-Continent field between March 1, 1935 and April 30, 1936. The respondents' tabulations[46] were slightly different inasmuch as they included purchases by Sinclair, excluded sales by defendants who had already been dismissed, and either eliminated or reclassified[47] sales which the Government had either omitted or improperly classified. This reduced the total number of tank-cars involved from 9,204 to 6,920-2/3. Nevertheless, as the following table shows, the results were very similar to those reached by the Government.

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[45]Govt. Exs. 750, R. 3276; and 751, R. 3278.

[46]Def. Exs. 1025, R. 3809; 1026, R. 3810. The purchases during 1935 were also introduced in chart forms as Exhibit 1024, R. 3807. Prior to the introduction of these exhibits the Defense had introduced a number of studies of the prices paid by individual companies, as follows: Socony-Vacuum (Def. Exs. 712, R. 3173; 713, R. 3177); Pure Oil (Def. Exs. 741, R 3237; 741-A, R. 3263; 856, R. 3413; 857, R. 3417; 858, R. 3421; Wescoat, R. 1139-43); Mid-Continent (Def. Exs. 869, R. 3437; 870, R. 3443; 871, R. 3447; 872, R. 3451; 873, R. 3455; J. D. Miller, R. 1550-5); Shell (Def. Exs. 889, R. 3481; J. D. Miller, R. 1573-9); Globe (Def. Exs. 998-1003 inclusive, R. 3756-68; J. D. Miller, R. 1609-10). It had also introduced a study of the *sales* made by the Danciger Oil & Refining Company to major companies (Def. Ex. 868, R. 3433; J. D. Miller, R. 1539-46). Since the results of these studies merely verify the conclusions reached above, they need not be discussed in detail.

[47]J. D. Miller, R. 1593-1610, 1650-51.

Price Group	Government's Study Tank-Cars	%	Respondent's Study Tank-Cars	%
Above the lowest quotations in Platt's Oilgram	745	8.09	516	7.5
Above the lowest quotations in Chicago Journal of Commerce	984	10.7	992	14.3
At the lowest quotations in Platt's Oilgram	6407	69.64	4491-2/3	64.9
At the lowest quotations in Chicago Journal of Commerce	6564	71.31	4419-2/3	63.9
Below the lowest quotations in Platt's Oilgram	2052	22.27	1912-2/3	27.6
Below the lowest quotations in Chicago Journal of Commerce	1656	17.99	1508-2/3	21.8
Total	9204	100.00	6920-2/3	100.00

The respondents' study also showed that only 48 tank-cars or 0.7 per cent of the total had been purchased above the high quotations in the Journal, and that only 55 or 0.8 per cent of the total had been purchased above the high quotations in the Oilgram.[49] During the price rise in March, April and May, 1935, there were only ten purchases of third grade gasoline above the low of either journal, and only five above the low of both. On the other hand, there were 107 purchases below the low quotations of both journals.[50] During the entire year

[49]Def. Exs. 1025-6, R. 3809, 3810. The Government's tabulations showed that only 228 or about 2.47 per cent of the 9,204 cars treated therein had been purchased at more than an eighth of a cent above the low quotations of the Journal (Govt. Ex. 751, R. 3278), and that only 202 cars or 2.2 per cent had been purchased at more than an eighth of a cent above the low quotations in the Oilgram (Govt. Ex. 750, R. 3276). An eighth of a cent represents the usual spread between the low and the high quotations on both publications (Def. Exs. 712, R. 3173; and 713, R. 3177).

[50]Def. Ex. 1024, R. 3807.

1935 the majors made only ten purchases of third grade gasoline at prices above the high quotations in the trade journals. Four of these occurred before the Mid-Continent buying program started.[51] The percentage of purchases at prices *below* the low quotations was higher during March, April, and May, when the price rise occurred, than during the indictment period as a whole. The percentages of purchases *above* the low quotations was lower during the price rise than during the period as a whole.[52]

There were no purchases of regular gasoline at prices above the high quotations in 1935. During most of the days of that year the majors made no purchases of regular gasoline whatever.[53] The respondents, however, went further than this, and proved that *the prices reported in the market journals, which, as we have just seen, were generally higher than the prices paid by the defendants, were in fact competitive prices, established by open bargaining between independent refiners and jobbers and consumers purchasing on the open spot tank-car market.*

To do this the respondents made an audit of the sales records of the independent refiners themselves. The audit in question[54] was embodied in Defendants' Exhibit 1024.

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[51] J. D. Miller, R. 1669.

[52] J. D. Miller, R. 1663-4.

[53] Def. Ex. 1024, R. 3807; J. D. Miller, R. 1662, 1669.

[54] Here again the Defense offered two preliminary studies before completing its final proof: (1) Flat prices paid to Danciger Refineries, Inc. by jobbers and consumers, November 1, 1934-December 31, 1935 Def. Ex. 868, R. 3433; J. D. Miller, R. 1540-46; and (2) flat prices paid to Deep Rock by jobbers and consumers, 1935 (Def. Ex. 890, R. 3485; J. D. Miller, R. 1587-90). Inas-

It reflected nearly a year's work,[55] in the course of which the respondents' auditors had examined the records of (1) all of the independent Mid-Continent refiners named in Paragraph 22 of the Indictment; (2) two other Mid-Continent refiners and a broker; (3) all the East Texas refiners named in Paragraph 20 of the Indictment insofar as they had sold gasoline on a "Group 3" freight basis and insofar as their records were available; (4) Deep Rock, Mid-Continent and Continental, the only majors which made spot sales on a "Group 3" basis.[56]

This study showed that the market journal quotations reflected accurately the range of prices in sales to jobbers on the open spot tank-car market at the prices indicated by the quotations in the trade journals. Eight per cent of the jobber purchases of third grade gasoline were

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much as these studies were consolidated in the Master Study described below, they need not be discussed in detail.

The Government attempted to discredit the Danciger study on the ground that certain of the sales of third grade gasoline which appeared to have been made at prices above the low quotations in the trade journals were really "62/65 octane gasoline" on which it is customary to charge an eighth of a cent premium. (W. J. Miller, R. 1845-6, redirect, 1854; Edwards, R. 1859.) In other cases Danciger had to pay a ¼¢ rebate to a competing jobber in whose "territory" the gasoline was sold. (W. J. Miller, R. 1846.) In still other cases, it appeared the gasoline had been sold in compartment cars for which Danciger customarily charged an undisclosed premium. (*Ibid.*) On cross examination, however, the Government's witnesses admitted that, except in two instances, even the so-called "62/65 octane gasoline" was really 62 octane gasoline and so had been properly treated as third grade gasoline. (W. J. Miller, cross, R. 1850, 1852; redirect, R. 1853-4; Edwards, cross, R. 1859.) It was also brought out that in cases where a rebate was paid, the purchaser still had to pay the full price reflected by the chart. (W. J. Miller, R. 1853.)

[55] J. D. Miller, R. 1655.

[56] J. D Miller, R. 1652-4.

above the high quotations. Ten per cent were at the high quotations. Seven per cent were between the high and the low quotations. Only 16 per cent were below the low quotations.[57] Major companies had made only about one per cent of their purchases above the high quotations, and from 21 to 28 per cent below the low.[58]

The study revealed similar results in the case of regular gasoline.[59]

In almost every case where the majors paid a new price for gasoline it appeared that jobbers and consumers had already been paying that price for some time past. Exhibit 1024 (which, as stated above, did not include all sales to jobbers and consumers) revealed only two days during the entire year 1935 when this was not true. Even on those two days, the major purchases clearly did not affect the quotations in the trade journals.[60]

6. *Amounts purchased.*

In 1935, the 14 independent Mid-Continent refiners named in the indictment sold 377,988,736 gallons of gasoline.[1] The respondents purchased only 56,268,712 gallons or a little over 14.9 per cent of the total output of such independent refiners in 1935.[2]

The percentage is reduced if 15 other independent refiners not named in the indictment are also consid-

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[57] J. D. Miller, R. 1665.
[58] J. D. Miller, R. 1665-6.
[59] J. D. Miller, R. 1665.
[60] J. D. Miller, R. 1666-8.
[1] J. D. Miller, R. 1645.
[2] J. D. Miller, R. 1646, 1649. Purchases by the former defendants, Standard of Indiana and Barnsdall (amounting to some 8,232,000 gallons) have been eliminated. See Def. Ex. 984, R. 3723; Evans, R. 523-5.

ered. The 29 refiners sold in 1935, 903,296,529 gallons, of which the respondents bought 94,460,164 gallons or about 10.5 per cent.[3]

7. Amounts manufactured by the independent refiners.

The indictment charges that in furtherance of the conspiracy the independent refiners, at the instance of Arnott, McDowell, Tuttle, Boggs and Bourque, curtailed their production of gasoline.[1]

Under the Code, of course, the independent refiners' operations were restricted, not by the respondents, but by Refinery Control sections of the Code.[2] After the *Schechter* decision, the Western Petroleum Refiners' Association collected certain statistical information from its members,[3] and on the basis thereof recommended schedules of maximum production to them.[4]

There was, however, no evidence to show that any of the respondents or that any other major company or agent thereof had anything to do with such recommendations or that such recommendations were connected in any way with the buying program. The individual who signed the recommendations, C. M. Boggs, was made a defendant

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[3]J. D. Miller, R. 1645, 1649. Purchase by the former defendants, Standard of Indiana and Barnsdall, amounting to some 8,272,000 gallons, have been eliminated. See note 2, *supra*.

[1]Indictment, paragraph 23, R. 15.

[2]See pp. 45-7, *supra*.

[3]Govt. Exs. 757-65, R. 3285; 788-808, R. 3294-3301.

[4]Govt. Exs. 767-87, R. 3286-93.

under the indictment but the trial court dismissed the indictment as to him at the end of the case.[5]

Moreover, the fact was that the production of the Mid-Continent independent refiners named in the indictment (except Taxman Refining Company whose figures were not available) ran as follows during 1934, 1935 and 1936:[6]

Year	Gallons Produced	% Increase over Previous Year
1934	295,154,204	
1935	356,862,132	About 21%
1936	397,780,076	About 11.5%

Taking into account ten other Mid-Continent independent refiners, not named in the indictment, the corresponding figures would be as follows:[7]

Year	Gallons Produced	% Increase over Previous Year
1934	659,933,992	
1935	774,350,817	About 17%
1936	868,156,624	About 12%

It thus appears that the refiners named in the indictment as co-conspirators increased their production even more than those not named in the indictment.[8] It also appears from Defense Exhibit 947,[9] which shows the gasoline consumption in the Mid-Western area from 1930 to 1936, that the consumption in that area in 1935 was

[5] R. 2477.
[6] J. D. Miller, R. 1617-8.
[7] J. D. Miller, R. 1618.
[8] J. D. Miller, R. 1619.
[9] R. 3639. See also Def. Ex. 726, R. 3189.

only 6.99% more than in 1934, and that in 1936 it was only 10.58% more than that in 1935. Thus the increase in the Mid-Continent refiners' operations was greater than the increase in consumption in the market where they usually sell their product.[10]

G. Continuation of buying after the Schechter decision.

From the time of its appointment in January until May 27, 1935, the Tank-Car Stabilization Committee operated as a sub-committee of the General Stabilization Committee which the respondent Arnott had appointed as a result of Secretary Ickes' letter of July 20, 1934.[1] Arnott felt that the major companies were participating in the program as the result of a "recommendation" from him.[2] The members of the Mechanical Sub-Committee were reimbursed for their telephone calls and other expenses by the Planning and Coordination Committee in Washington.[3]

On May 27, 1935, however, the Supreme Court invalidated the Code provisions of the N. I. R. A. in the case of *Schechter Poultry Corp.* v. *United States.*[4]

On May 28, Chairman Fahy of the Petroleum Administrative Board stated that the industry had registered large gains during the adoption of the Code and that "as much of the gain as possible should be maintained by voluntary action until there is new legisla-

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[1]Frey, R. 1266.

[2]Arnott, cross, R. 1755-6.

[3]Jacobi, R. 463, cross, R. 472; McDowell, R. 1213; Def. Exs. 708, R. 3138; 903, R. 3505.

[4]295 U. S. 495. Arnott, R. 1706.

tion.'"[5] After a White House conference the same day, Donald Richberg, the National Recovery Administrator, issued a similar plea to industry in general. He stated that it would be most harmful to the general welfare if unfair competitive practices were to be revived and if fair standards of treatment for labor were to be disregarded. He hoped that all employers would cooperate in maintaining code standards of fair competition and labor relations.[6] On the 30th, President Roosevelt expressed the hope that industry would adhere to the codes voluntarily, but feared that "chiselers" might drive honest business to the point where it would have to cut wages and lengthen hours in order to survive.[7] During this period the President also pointed out that, with the invalidation of the N. I. R. A., the anti-trust laws were in full force and effect. Again, however, he stated that those laws did not forbid all cooperative action, and expressed the hope that industry might solve its difficulties through voluntary codes.[8] These statements were published in newspapers throughout the country, and became matters of general information for the oil industry.[9]

On June 2, 1935, the Board of Directors of the American Petroleum Institute appointed a committee under Arnott to prepare a proposed marketing code for submission to the Federal Trade Commission,[10] and Arnott

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[5]Def. Ex. 900. R. 3499, 3500.
[6]Def. Ex. 899, R. 3497.
[7]Def. Ex. 901, R. 3503.
[8]Govt. Ex. 904, R. 3507.
[9]McDowell, R. 1209.
[10]Arnott, R. 1707.

called an industry meeting at the Blackstone Hotel in Chicago for June 6 and 7, 1935. It was attended by substantially the same people who had attended the General Stabilization Meetings under the Code. Arnott spoke on the effect of the *Schechter* decision, and said that he had talked to a number of industry leaders, to the Planning and Coordination Committee, and to the Code authorities in Washington. They were all of the opinion that the industry should "carry on"—that even though the Code had been knocked out, they should attempt to hold the advantages gained and to carry on voluntarily the constructive activities they had learned under the Code. There were several references to the statements made by Fahy, Richberg, and President Roosevelt as indicating that official Washington favored such a course.[11]

The regular monthly meeting of the Tank-Car Stabilization Committee was held immediately after Arnott's meeting. All the members, except Bullock, attended. Every member had attended Arnott's meeting. The discussion revealed a general feeling that the committee's activities were proper and constructive. Healthy business conditions had compelled the individual companies to keep on buying regardless of the *Schechter* decision, and they all said that they would like to continue to get the information contained in the monthly surveys. It was decided to continue to request this information from Bourque and to hold meetings whenever convenient.[12]

McDowell reported to Arnott that in view of the expressed attitude of the Government officials and leaders

[11]McDowell, R. 1208-9; Arnott, R. 1706.
[12]McDowell, R. 1211-2.

of industry, the Tank-Car Committee was going to continue to operate on a voluntary basis. Arnott agreed that this was a fine thing to do.[13]

The Tank-Car Committee continued to meet each month through February, 1936.[14] The procedure followed at these meetings was essentially the same as at the earlier meetings.[15]

Gradually, as the contacts between buyer and seller became well established, the program worked almost automatically. Toward the end it was difficult to get the members to attend. McDowell, himself, attended only three of the meetings after June, 1935.[16] The last meeting, on February 27, 1936, was very informal, being attended only by Ashton, Bourque, Jacobi and a few others.[17] As a result of discussion at this meeting among Jacobi, McDowell and Tuttle, it was decided to discontinue the monthly meetings and to give out the necessary information over the telephone. During March and April, 1936, Jacobi called Globe, Shell, Pure and Sinclair and suggested that, if possible, they should continue to buy from the companies from which they had been buying in the past. Jacobi did not know whether McDowell and Tuttle had made similar calls.[18]

The Sub-Committee continued to meet at irregular intervals until December, 1935.[19] Here, too, there was dif-

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[13]McDowell, R. 1212; Arnott, R. 1707.
[14]Jacobi, R. 400.
[15]McDowell, R. 1208.
[16]McDowell, R. 1207-8.
[17]Jacobi, R. 400.
[18]Jacobi, R. 468.
[19]McDowell, R. 1205-6.

ficulty in assembling a quorum because the members were frequently out of town.[20] No meetings were held after December, 1935; thereafter the Committee carried on the work by telephone.[21]

When Jacobi appeared before the Grand Jury at Madison on May 19, 1936, he abandoned all activities in connection with the program.[22]

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[20] Jacobi, R. 431; McDowell, R. 1205.
[21] Jacobi, R. 396; McDowell, R. 1206.
[22] Jacobi, R. 396, 400.

V.

Purchasing Activities in East Texas.

A. The organization of the East Texas Refiners' Marketing Association.

The indictment charges in Paragraph 20 that the East Texas Refiners' Marketing Association "was formed in February, 1935, with the knowledge and approval of some of the defendants, for the purpose of facilitating the sale of gasoline to defendant major oil companies." The evidence bearing on this charge is as follows:

Throughout the Code period, the independent refiners in East Texas had been one of the most demoralizing factors in the industry. They had ignored the state and federal conservation laws, exceeded their refinery allocations under the Code, and sold their products below cost.[1]

The establishment of the first Tender Board in October, 1934, curtailed the activities of these refiners for a time,[2] but they were attacking the Board's authority in the so-called "*Panama* case,"[3] and on January 7, 1935, this Court decided that case in their favor, holding section 9(c) of the N. I. R. A. unconstitutional.[4]

On December 10, 1934, however, the Texas legislature passed a law, modeled on the Federal Tender Regulations, which forbade carriers to receive or transport gasoline unless it were accompanied by tenders from the State

[1]Arnott, R., 1709, 1716, 1717.
[2]Lanzer, cross, R. 258.
[3]Van Covern, R. 1510.
[4]293 U. S. 388.

Railroad Commission.[5] F. W. Fischer, the attorney for the Panama Company and for a number of other hot oil refiners, decided that, whether he won or lost the *Panama* case, the new state statute would be held valid. When that happened, his clients would be unable to ship their excess gasoline.[6] Sometime in January,[7] therefore, he called them together and advised them that they had better prepare to obey the law and use legal crude oil.[8]

Fischer's announcement was a blow to the refiners. As long as they had operated on cheap hot oil, they had been able to compete for business all over the middle west.[9] If they had to use legal crude and pay a dollar a barrel for it, their costs would be trebled or quadrupled. Since the Mid-Continent refiners were much nearer the market, they would also have to compete against a freight differential of about a sixth of a cent per gallon.[10] They were already supplying the jobbers and dealers of Texas with all the gasoline they could use and could not expect to sell them any more.[11] They immediately asked Fischer where they were going to find a market for their gasoline.[12]

Fischer had in mind the formation of a central sales organization similar to that involved in *Appalachian Coals, Inc.* v. *United States*[13] which the refiners could use

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[5]Fischer, R. 1117.
[6]Fischer, R. 1118-19.
[7]Cline, R. 668.
[8]Fischer, R. 1119.
[9]Shatford, R. 1001-2; Arnott, R. 1710.
[10]Beroth, R. 184; Cline R. 643.
[11]Cline, R. 643.
[12]Fischer, R 1119.
[13]288 U. S. 344 (1933).

to distribute their surplus gasoline. They would continue to sell as much gasoline as possible directly to their own customers, and turn the rest over to the sales agency.[14]

Fischer's opinion as to the validity of the state Tender Law was sustained by the courts.[15] During the next month or so about sixty East Texas refiners went out of business.[16] A number of the survivors decided to adopt Fischer's idea. With his assistance, they commenced the organization of the "East Texas Refiners' Marketing Association," to dispose of their surplus gasoline.[17] At a meeting in Gladewater, they appointed a committee under M. Travis of the Southport Petroleum Company to develop their plans more fully.[18] The testimony of Travis that "none of these defendant major oil companies had anything to do with the formation of the East Texas Refiners' Association, absolutely nothing whatever,"[19] was undisputed.

The Association's first problem was to find customers. The refiners had little choice in the matter. They already had the Texas market saturated with gasoline,[20] and they could not ship northward on account of the freight differential.[21] Their only alternatives were to dump their gasoline on the market on a distress basis or to sell it to major

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[14]Fischer, R. 1119-20.
[15]Fischer, R. 1118.
[16]Bradshaw, cross, R. 706-7; Van Covern, R. 1511-2.
[17]Fischer, R. 1119; Travis, R. 1127-8.
[18]Travis, R. 1127.
[19]Travis, R. 1128. It will be recalled that Arnott had never heard of the Association until Buckley told him about it on February 11. See p. 152, *infra*.
[20]Cline, R. 643.
[21]Beroth, R. 184; Cline, R. 644.

companies who might buy for shipment to the eastern seaboard.[22] Sinclair, Gulf, Cities Service Export and possibly Sun were already purchasing in East Texas.[23] The Travis committee was directed to find a man who could contact these companies and others, and persuade them to buy more and to buy it through the Association.[24]

B. The engagement of Buckley to represent the Association.

Travis suggested the name of Neil Buckley, a buyer for Cities Service Export Corporation in Tulsa, whom he had known for five years and in whom he had a great deal of confidence. The committee decided to approach him on the subject.[1]

Late in the afternoon of January 29, 1935, Travis and H. B. May (who later became the president of the Association)[2] telephoned Buckley and told him about their plans. They said that they were going to cooperate with the state and federal authorities in eliminating hot oil; that they were going to establish recognized standards for their products;[3] and that they wanted him to come down and see what they were doing, and, if he felt they were sincere, to go out and help them.[4] Buckley told them that they would have to see his superiors.[5]

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[22]Travis, cross, R. 1129-30.
[23]Travis, R. 1131.
[24]Travis, R. 1127.
[1]Travis, R. 1127, 1128.
[2]Cline, R. 624.
[3]Buckley, R. 566-7.
[4]Buckley, R. 567-8; Travis, R. 1129.
[5]Buckley, R. 568.

There had been a number of reports about the suggested formation of an association[6] and Buckley had just dictated a letter[7] to his superior, H. E. Brandli, setting out what he had heard about the proposed "central sales agency."

After receiving the telephone call from May and Travis, he added the following postscript:

> "P. S.
> Learned today that some of the members of the proposed organization discussed among themselves the possibility of obtaining cooperation from some of the Major Companies and furnishing an experienced man to operate the proposed agency for a period of six months or more. Their idea was to borrow the services of such an individual. We were asked whether we would consent to consider such a task were it offered to us, and replied that any overture along this line would have to be made to the Officials of the company. You will recall that Mr. Bennett[8] had such an idea last May or June."

Either late that night or early the next morning, Travis called Buckley again saying that they did not know his superiors, and asking if he would take the matter up with them himself. The next morning Buckley called Brandli in New York, and told him about his conversations with the refiners.[9]

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[6]Buckley, R. 567, 568.

[7]Govt. Ex. 14, R. 2615.

[8]This is apparently a reference to Howard Bennette, the late president of the Western Petroleum Refiners' Association, who had played a prominent part in the Government-sponsored buying programs in 1934. (Gray, R. 1828. Shatford, cross, R. 1078. Shatford, offer, R. 1048.)

[9]Buckley, R. 568-9.

Brandli referred the matter to F. R. Coates, who was a vice-president of Cities Service Export and a member of the Planning and Coordination Committee in Washington.[10] Coates in turn sought the advice of J. D. Collett, the chairman of the Planning and Coordination Committee and of Dr. E. R. Lederer, the District Allocator who administered the refinery control sections of the Code in East Texas.[11]

Apparently the advice was favorable for on February 1st, Brandli wired Buckley as follows:[12]

> "Arnott away vacation. Coates discussed matter with Jim Collett and Dr. Lederer, both Washington, and both agree excellent idea. They believe majors will cooperate. Believe you appreciate undertaking no small job and will require endless amount work to keep all these Texas refiners in line. You have the confidence of all here and believe you can put it over so go to it. Best wishes for your success."

The next day, Buckley replied by letter saying:[13]

> "Under present plans will be in East Texas on Monday. The group of the larger Refiners who are proposing a Central Marketing Agency expect to have a meeting either Monday evening or Tuesday.
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> "Will communicate with you by Telegraph some-

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[10]Franklin, R. 947, 948.

[11]Collett, R. 1802; See Buckley, R. 618.

[12]Govt. Ex. 36, R. 2635; Buckley, R. 569-70.

[13]Govt. Ex. 15, R. 2617; Buckley, R. 569. On the same day, Buckley wrote Brandli another letter (Govt. Ex. 16, R. 2617) in which he expressed grave doubts as to the success of the Association on account of unsettled conditions in the East Texas field (Buckley, R. 569).

time during Monday, advising you a telegraphic address for Tuesday morning.

"Because of the uncertainty of the outcome of the legal entanglement which now surrounds the East Texas plants, it is not possible at this time to pass along any comment on the proposed venture. Will let you have complete information just as early in the week as any news is available."

Buckley arrived in the East Texas field about noon on the 4th, and went to Gladewater, where he talked to several of the refiners. That evening there was a meeting of prominent East Texas refiners at May's house in Overton to complete the formation of the Association. Buckley left before the meeting had started, but he talked to several more refiners in an effort to determine whether he wanted to have anything to do with the Association. It appeared that they wanted him to go to the major companies immediately, and he took the 8:30 train to Houston.[14]

C. Buckley's attempts to find purchasers for East Texas gasoline, February 4-11, 1935.

The next morning Buckley called on O. H. Carlisle, the district sales manager of Gulf,[1] and upon a man in the marketing department of the Texas Company.[2]

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[14]Buckley, R. 570-71, cross, R. 616-7.

[1]Buckley, R. 571-2.

[2]Buckley, R. 571. While in Houston, Buckley also called upon Ben Brown of the Humble Oil & Refining Company (Buckley, R. 571), and Mr. Irwin of the American Petroleum Company (Buckley, cross, R. 617). He also talked on the telephone with Mr. Legge of the Magnolia Petroleum Company (Buckley, cross, R. 618). The record contains no information about these conversations except an intimation that Brown had something to do with the East Texas refiners' decision to send Buckley to the East Coast (Buckley, R. 573).

He explained the situation to each of those gentlemen, stressing the desire of the East Texas refiners to cooperate with the state and federal regulatory bodies and to deal on a legitimate basis, and asked them if their companies would consider doing business through the Association. Carlisle told him that, in view of his past experience with East Texas refiners, he wouldn't think of doing so. The Texas Company man told him that he had no authority to discuss the subject.[3]

On the evening of the 5th, Buckley returned to Dallas and reported to May, Travis, and two other members of the Association. He told them that he wasn't making much headway, and that they ought to get someone else for the job. The refiners, however, persuaded him to go to the eastern seaboard[4] and promised to pay his traveling expenses and telephone bills.[5] They also located Dr. Lederer, the District Allocator for East Texas, in Pittsburgh, and asked Buckley to get in touch with him.[6]

Buckley took the night plane out of Dallas and arrived at Pittsburgh late the following night. On the 7th, he attempted unsuccessfully to see W. V. Hartmann, the vice-president of Gulf. One of Hartmann's assistants told him that it would be useless to see anyone in the Gulf organization, so he merely left his name and address and the address of the Association.[7]

While in Pittsburgh, however, he saw Dr. Lederer, the District Allocator, and explained the situation to him.

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[3]Buckley, R. 572.
[4]Buckley, R. 573; cross, R. 618.
[5]Buckley, R. 578-9.
[6]Buckley, cross, R. 618.
[7]Buckley, R. 573.

Lederer told him that the only man who could help him was Arnott, the Chief Stabilizer under the Planning and Coordination Committee.[8] Since Buckley had never met Arnott, Lederer called him on the telephone.[9] After saying that Arnott had always seemed interested in stabilization activities on behalf of the independent refiners, Lederer stated that he would like to have him meet Buckley who had something very interesting and important to lay before him. He said that he had talked to J. D. Collett, the Chairman of the Planning and Coordination Committee, and that the latter joined in his request.[10]

At first, Arnott demurred on the ground that he needed a rest, but Lederer insisted that the matter was urgent.[11] Finally he introduced Buckley over the telephone and Arnott agreed to see him on February 11th.[12]

Buckley left Pittsburgh that night and went on to New York, where he saw H. D. Frueauff the vice-president of various Cities Service companies, and his own superior, Brandli.[13] Frueauff told him that Cities Service itself did not buy gasoline, but that Buckley could go to its subsidiaries, Cities Service Export and Louisiana Oil Company, and if they were interested, they could do what they chose. Brandli told Buckley that the Export Company might be interested in buying for its own needs.[14]

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[8]Buckley, cross, R. 618.

[9]*Ibid.* Arnott thought that this conversation occurred two days later when Buckley was in Washington (Arnott, R. 1708).

[10]Arnott, R. 1708.

[11]*Ibid.*

[12]*Ibid;* Buckley, cross, R. 618.

[13]Buckley, R. 592, 594-5.

[14]Buckley, R. 592, 594-5.

On February 13, he gave the East Texas Association its first order.[15]

The next day Buckley went to Washington. After spending the late afternoon in that city, he went on to Pinehurst, North Carolina to see Arnott.[16]

D. Arnott's attempts to help Buckley, February 11-March 20, 1935.

1. *The February 11 conference at Pinehurst.*

Buckley arrived in Pinehurst on February 11th, and told Arnott about his efforts on behalf of the East Texas Refiners Association. He said that he was rather discouraged, having found that the major companies had very little confidence in the sincerity of the refiners, and that Dr. Lederer had suggested coming to Arnott for advice and assistance. He assured Arnott that he had analyzed the situation with care; that he really felt that the refiners were sincere; and that they had everything to gain by cooperating with the industry and the Petroleum Administrative Board. In conclusion, he asked Arnott if he would help get the major companies to buy East Texas gasoline.[1]

Arnott had never heard of the Association before.[2] He told Buckley that he was very interested, but that the industry had found the East Texas refiners one of the most demoralizing factors with which they had to contend. He questioned Buckley as to why he thought they

[15]Def. Ex. 716, R. 3183; Cline, R. 632.
[16]Buckley, R. 574.
[1]Buckley, R. 574; cross, R. 618-19; Arnott, R. 1708-9.
[2]Arnott, R. 1709.

were going to reform, pointing out that there had been a number of unsuccessful attempts to make them observe the Code, and that he would have to overcome the industry's prejudices and doubts on this score.[3] Finally said he wanted an opportunity to investigate and to think the matter over further, and that he would communicate with Buckley when he returned from his vacation.[4]

2. The February 25 meeting at Chicago.

When Buckley had returned to Tulsa, Arnott telephoned him, saying that he was holding a meeting in the Blackstone Hotel in Chicago on February 25 to discuss Texas stabilization matters, and that if Buckley wanted to attend the meeting with a few East Texas refiners, and discuss their plans, he could do so.[5]

On February 25, Buckley arrived in Chicago with May and M. Grogan of the Association.[6] He went to the Blackstone alone.[7] There he found Arnott, together with representatives of Gulf, Magnolia, Texas and Sinclair, and A. P. Dyer, the Chairman of the Code Marketing Committee for Texas.[8] Arnott told Buckley that the first part of the meeting would be devoted to Texas marketing matters, but that he should remain on call: Later, he explained Buckley's presence to the meeting, and invited him in to speak. Buckley described the

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[3] *Ibid.*

[4] Buckley, R. 574; Arnott, R. 1710.

[5] Buckley, R. 575; Arnott, R. 1710.

[6] Buckley, R. 575.

[7] Buckley, R. 581.

[8] Buckley, R. 575-7; Arnott, R. 1711. None of the individual defendants attended except Arnott. (*Ibid.*) McDowell dropped in for a half hour or so, but did not see or hear Buckley (McDowell, R. 1192).

plans of the East Texas refiners in much the same terms he had used at Pinehurst, adding that Arnott had raised many questions, and that he hoped that he could satisfy them as to the sincerity of the East Texas Association and its members.[9]

There were very few questions during Buckley's speech, and there was very little discussion after he had left. Those present had suffered severely from the activities of the East Texas refiners, and they were almost unanimous in declaring that they had no confidence in their purported reformation. After Buckley had left, the meeting went on as before.[10]

Later in the day Arnott saw Buckley again and the latter told him that May and Grogan were in town and wanted to see him personally. Arnott saw them the next day, the conversation being more or less a repetition of what Buckley had already said. The refiners were obviously worried because they knew how the industry felt toward them, and they pleaded with Arnott to assist Buckley.[11] Arnott told Buckley that he might get in touch with him later.[12]

3. *The March 6 meeting in New York.*

On March 1, Arnott wired a small group of major company representatives, inviting them to attend a meeting at the Waldorf-Astoria Hotel in New York on March 6 "to hear outcome my meeting with East Texas refiners

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[9]Buckley, R. 576; Arnott, R. 1710-1.

[10]Arnott, R. 1711.

[11]Arnott, R. 1711-2.

[12]Arnott, R. 1712. Upon returning to East Texas Buckley had an interview with Fischer (Buckley, R. 577; Fischer, R. 1120)

and to consider future action surplus gasoline this and other groups that is awaiting our decision.'"[13] Among those who attended were representatives of Socony-Vacuum, Gulf, Pure, Sinclair,[14] and probably Sun, Shell, Atlantic, Richfield, American Oil, Pan-American, Cities Service and Texas.[15]

These companies were all particularly active on the East Coast[16] and buyers and users of East Texas gasoline. Companies whose interests lay primarily in the Middle-West were not invited[17] because East Texas gasoline never appeared in the Middle-West except under unusual conditions.[18]

Arnott invited Buckley to the meeting. He also invited O. D. Robinson, the president of the Republic Oil Company, who was acting as spokesman for the independent refiners on the Gulf of Mexico. M. L. Benedum, the principal stockholder of Republic, and one of the Government's representatives on the Planning and Coordination Committee had sent Robinson to Arnott early in January[19] to tell about the distressed condition of the Gulf refiners.[20]

Arnott opened the meeting with a speech in which he pointed out how uncooperative the East Texas refin-

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[13]Govt. Ex. 482, R. 2996; Buckley, R. 579.
[14]Buckley, R. 579, 581.
[15]Arnott, R. 1713, 1714. The only individual defendants present were Arnott and McElroy. (*Ibid.*)
[16]Arnott, R. 1714.
[17]Arnott, R. 1713-4.
[18]Arnott, R. 1714.
[19]Arnott, R. 1715-6.
[20]Arnott, R. 1715.

ers had been in stabilization, and said that he believed it was his duty to have Buckley and Robinson talk to them and to see what could be done to improve the situation. He said that both men were trying to find buyers for gasoline from their groups.[21]

Buckley was then invited in and told the meeting substantially what he had already told Arnott.[22]

There were a number of requests for further information most of them indicating a lack of confidence in the East Texas refiners. Buckley seemed to have no very dependable information as to the probable amount of gasoline or as to the size of the independent refiner's Federal refinery allocations, or as to whether their distress gasoline was going to be manufactured within those allocations.[23] He did not get any particular response from the meeting. Those present seemed principally interested in what the Association was going to do about hot oil. "Everyone was scared to death of handling East Texas gasoline and of going back to East Texas to buy." Buckley was specifically asked whether the refiners were sincere, and whether they were going to support the Connally Act. He assured the meeting that they were.[24]

After Buckley had made his statement, Arnott suggested that he withdraw,[25] saying that if anything could be done toward handling the surplus gasoline he would let

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[21] Arnott, R. 1717.

[22] *Ibid*; Buckley, R. 579.

[23] Arnott, R. 1718. Buckley obtained some information (though apparently not enough) over the telephone from R. N. Cline, the secretary of the Association in Texas (Buckley, R. 580).

[24] Buckley, R. 580-1.

[25] Arnott, R. 1717.

him know.[26] The meeting was then turned over to a general discussion. Some thought that the matter should be examined further, and that they would be justified in seeing what could be done to help the independent refiners. Others definitely stated that they had no confidence in Buckley's presentation and would have nothing to do with it.[27]

Arnott called attention to the fact that the District Allocators were meeting in Washington during the next week to divide the national refinery allowable into regional allocations. The group felt that, being unable to get reliable information from Buckley, they should talk to the Allocators. The latter could tell them, not only the amount of the allocations which they were going to allow to these refiners, but whether the hot oil which they had been running was going to be taken into account in fixing those allocations.[28] Accordingly, Arnott appointed a five-man committee to go to Washington and see the Allocators.[29]

While in New York at this time, Buckley saw the respondent R. H. McElroy of Pure. He told him that he was trying to get help for the East Texas refiners, and asked him whether Pure was going to be in the market. McElroy replied that Pure needed gasoline badly, but

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[26]Buckley, R. 580.

[27]Arnott, R. 1718.

[28]In a letter to another Socony-Vacuum executive, dated March 12th (Govt. Ex. 305, R. 2956), Arnott stated that the purpose of going to Washington was "to acquaint them [the Allocators] with full details and have a check on the figures of the allocation of these particulars refiners so that the program we are working on would not in some way show later that these refiners were not standing by their promises."

that they were afraid to buy it in East Texas and would not do so unless they were assured that the Federal Tender Board was going to function properly. If there was no such assurance, they were going to buy elsewhere.[30]

4. *The District Allocators' meeting on March 13.*

Arnott arrived in Washington on March 12. On that day, as described elsewhere[31], he conferred with the members of the Petroleum Administrative Board regarding the proposed Mid-Continent buying program. He also told the Board about the East Texas situation, how it had come to his attention, and the part which he was playing therein. He mentioned the fact that he was meeting with the District Allocators the following day.[32]

The Allocators' meeting on March 13th was attended by four members of the New York committee.[33] According to the minutes of the meeting,[34] Arnott first described the problem of distress gasoline and the manner in which it was being treated in the Mid-Continent,[35] and introduced Robinson and J. W. Carnes of Sinclair, who described the position of the Gulf refiners.[36] He then introduced Buckley[37] and the latter described the history and purposes of the East Texas Associa-

[30]Buckley, R. 593
[31]See p. 277, *infra*
[32]Arnott, R. 1719-20
[33]Def. Ex. 69, R. 2653; Arnott, R. 1719
[34]Def. Ex. 69, R. 2653
[35]Def. Ex. 69, R. 2653-2661
[36]Def. Ex. 69, R. 2661-2677
[37]Def. Ex. 69, R. 2677-2678

tion,[38] giving the allocation and production figures for East Texas and answering questions.[39] This was followed by a general discussion which occupied the balance of the morning session.[40]

Later in the day, several members of the New York committee came to Arnott's office and prepared a schedule showing the probable amount of surplus gasoline in East Texas and on the Gulf, as disclosed at the Allocators' meeting, the names of the regular buyers in those areas, and the amounts which they might take.[41]

5. *The March 15 meeting in New York.*

The next day Arnott, feeling that Buckley and Robinson were entitled to some idea of their prospects,[42] dispatched the following telegram to the men who had attended the meeting on March 6:[43]

> "The question of surplus gasoline which has been under consideration must be finalized tomorrow. Urge you be present meeting at Waldorf Hotel Friday, March fifteenth, ten o'clock, Basildon Room. Telegraph reply."

The meeting was attended by substantially the same group as the March 6th meeting.[44] The members of the committee which had gone to Washington reported what

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[38]Def. Ex. 69, R. 2678-2680.
[39]Def. Ex. 69, R. 2680-2682.
[40]Def. Ex. 69, R. 2682-2686.
[41]Arnott, R. 1721; see Buckley, R. 582.
[42]Arnott, R. 1720-1.
[43]Govt. Ex. 17, R. 2619; Def. Ex. 331, R. 2964. Arnott, R. 1720. Subsequently the meeting was postponed to 2 P. M. of the same day (Def. Ex. 332, R. 2964).
[44]Arnott, R. 1720; Buckley, R. 581, 584.

had happened at the District Allocators' meeting.[45] Arnott then said that the East Texas refiners were pressing Buckley for a solution of their problem, and called for suggestions for handling the situation.[46]

Someone (probably Carnes of Sinclair) stated that it had been suggested that a group of twelve to fifteen larger companies should absorb a certain percentage of the surplus gasoline from East Texas. He then read from the schedule which had been prepared in Washington,[47] and explained that the schedule showed what the picture would be if all the known buyers of gasoline were to take part of the surplus.[48]

There was some discussion of the fact that not all of the potential buyers were represented at the meeting. Someone asked whether anyone had talked with the absent companies and it developed that one or two of them had stated that they would not buy any gasoline in East Texas.[49]

Finally those present were polled. Most of them stated that they had no authority to take gasoline without conferring with their superiors and their manufacturing departments. After about an hour's discussion, nothing had been decided as to who would buy, how much they would buy, or whether they would buy at all.[50] No one had said that his company would take the amount indicated on the schedule, or even that it was interested in buying at all. The Shell representative stated that his distrust of the

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[45]Arnott, R. 1721.
[46]Buckley, R. 582.
[47]Buckley, R. 582, 584.
[48]Arnott, R. 1721.
[49]Buckley, R. 582-3.
[50]Buckley, R. 583.

East Texas refiners was such that he would have nothing to do with them under any circumstances.[51]

Buckley sat around for a while to see if he could get an answer and then left the room discouraged.[52] After the meeting, he followed Arnott downstairs and thanked him for what he had done. He said that he felt quite discouraged; that those to whom he talked did not seem very friendly; and that he felt that his mission had been unsuccessful and that he was returning to East Texas empty-handed.[53] Arnott told him that he could understand why there had been no friendly response, but that the men were all cooperative; that Buckley should keep up his courage; and that the men would probably give the matter further consideration.[54]

6. *Buckley's conversation with Arnott in Washington, March 20.*

On March 20, Buckley went to Washington. While there, he visited the offices of the Planning and Coordination Committee and ran into Arnott,[55] who was attending one of the Committee's meetings. They talked briefly. Buckley said that he was still trying to accomplish something but that he was on his way to Texas, and wanted to know how Arnott felt about the situation. Arnott told him that he thought there was some promise; that companies like Sinclair were large purchasers in Texas; and that Carnes was very cooperative and might give him some

[51] Arnott, R. 1721.
[52] Buckley, R. 583.
[53] Buckley, R. 583-4; Arnott, R. 1721-2.
[54] Arnott, R. 1722.
[55] Arnott, R. 1722, 1723.

orders. He also said that Gulf was a substantial buyer in East Texas, and that he saw no reason why they should not be interested, once the reliability of the East Texas refiners had been established. He personally felt that the East Texas refiners were sincere, and that with Buckley representing them as ably as he was, there would soon be some interest in the Association.[56]

Buckley went to see Hartmann of Gulf and told him that he was discouraged over his failure to achieve any definite results. He asked Hartmann if he could do something to recognize the Association and encourage the work that they were doing. Hartmann replied that he was not unsympathetic with the objectives of the Association, but that Gulf did all its buying through J. M. Bradshaw, a broker in Houston. He said that he would have no objection, in fact he would approve, if Bradshaw got in touch with the Association.[57] Buckley may have asked Hartmann to have Bradshaw get in touch with the Association. If he did, Hartmann did not promise to do so.[58]

That same day, Arnott had a short talk with Hartmann. He pointed out that if the East Texas refiners were really going to cooperate and work under the Code, and eliminate part of the illegal crude, it would be well worth Gulf's while, as a large buyer, to consider it. Hartmann agreed that it was worth thinking about.[59]

While in Washington, Buckley also saw H. W. Dodge of Texas and Carnes of Sinclair and asked them if they were going to buy gasoline in East Texas. Dodge stated

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[56]Arnott, R. 1722.
[57]Buckley, R. 584-5, 592.
[58]Buckley, R. 585.
[59]Arnott, R. 1722-23.

that Texas was going to have to buy gasoline but he did not know where it would be bought. He suggested that Buckley visit his New York office.[60] Carnes told him that Sinclair was continuously buying gasoline and would probably buy more in the future, and that he saw no reason why they should not deal through the Association. However, he said the final decision rested with Tracey, and he would talk to Tracey about it.[61]

Upon returning to New York, Buckley called on R. D. Cottingham in the Texas Company's purchasing department, and told him about his conversation with Dodge. He tried to explain the nature of the East Texas Refiners' Marketing Association. Cottingham said that Texas had its own method of buying and would not be interested. Buckley told him that, regardless of his method of buying, the Association was a service organization and could protect him, without cost, against getting illegal products. Cottingham again said that he was not interested, and dismissed Buckley from his office.[62]

He also saw Noel Robinson of Tide Water regarding the possibility of having Tide Water buy through the Association. Robinson told him that Tide Water had a terminal or transit arrangement with a terminal refinery on the Gulf Coast, and that while they would not be in the market directly for gasoline, he thought that this refiner would buy some in East Texas. He appeared quite enthusiastic over what Buckley was trying to do to help the

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[60]Buckley, R. 585, 591, 592, 593.
[61]Buckley, R. 585-6, 592.
[62]Buckley, R. 586, 587, 591, 593.

refiners.[63] (Later, Buckley learned that the terminal company was buying some gasoline through the Association.)[64]

Buckley returned to Tulsa and thence to East Texas, where he attended an Association dinner in Gladewater. He reported that he was disappointed in the results that he had accomplished; that no definite plan for purchasing could be established; that he had been forced to contact individual companies; and that many of the major companies had refused to buy through the Association, or even to buy in East Texas. He also said, however, that some of the majors were already buying in East Texas, and that he felt sure that as the buyers became convinced that the refiners were sincere in their efforts to eliminate hot oil and that the Federal Tender Board was going to be effective they would return to the East Texas field and obtain their supplies there as they had in the past. He said he felt sure that Sinclair and Gulf would buy; that he had been told that the Texas Company might buy, and that there were two or three other potential buyers among the larger companies.[65]

E. The Association's methods of operation.

1. *Generally.*

The East Texas Refiners' Marketing Association was formally organized on February 13, 1935.[1] There were nine charter members,[2] nine elected members,[3] and five

[63]Buckley, R. 586, 588, 592, 594.
[64]Buckley, R. 588, 594.
[65]Buckley, R. 586-7.
[1]Buckley, R. 578.
[2]Cline, R. 623.
[3]Cline, R. 624.

companies which were permitted to use the facilities of the Association whenever they happened to be operating on federal tenders.[4]

All of the East Texas independent refiners named in the indictment either were members of the East Texas Refiners' Marketing Association or were allowed to use its facilities. The only member of the Association not named in the indictment was the Lake Refining Company. All of the officers of the Association were either independent refiners or employees of independent refiners.[5]

As already noted, the major companies practically ceased buying in East Texas after the *Panama* decision. The Association had only one customer—Cities Service Export—during February.[6] It really commenced operations in March,[7] when it negotiated sales to Cities Service Export, Gulf, Sinclair and Pure. The next month Cities Service Export ceased purchasing, but Tide Water Oil and Continental began.[8] Although the Association also sold from 25 to 50 tank-cars elsewhere,[9] these six companies were its principal customers.[10] They bought a total of 6,934 cars from it during the last ten months of 1935, and a total of 1,098 during the first four months of 1936. They continued to buy at the rate of over 400 cars a month for some time thereafter.[11]

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[4] *Ibid.*
[5] Cline, R. 623, 624.
[6] Cline, R. 632, 649-50, 663-4.
[7] Buckley, R. 578.
[8] Cline, R. 632, 649-50, 663-4.
[9] Cline, R. 637.
[10] *Ibid.*
[11] Cline, R. 664-6.

The expenses of the Association were defrayed by assessing the selling companies from $2.00 to $2.50 per tank-car on all sales made through the Association at the going market.[12]

2. Cline's functions.

Beginning on February 5th or 6th, 1935,[13] the Association's active manager was its "Assistant Secretary," Robert N. Cline,[14] who conducted its business for over three years[15] from his home in Tyler, Texas.[16] He described his method of operation as follows:

> The first thing every Monday morning I contact all the members in our Association. I find out two things from them; first, how much gasoline they will make during the week over and above their regular commitments and which they desire the Association to attempt to help them move. At the same time I get from that refiner an idea of what he wants for the product.[17]

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[12]Buckley, R. 597; Cline, R. 645, 647. Commissions were also charged on sales to Texas, although it did not buy through the Association but directly from its members. This was agreed to in the early days of the Association when it was hard-pressed for funds. Because of freight savings, the refiners made more money on sales to Texas than on sales in the Mid-Continent area (Cline, R. 631-2). The members of the Association reported their sales to Texas to Cline and he checked them once a week or so with Whitey May, Texas field man (Cline, R. 633). For three or four months in 1935, Cline got reports of purchases from Brakefield of Louisiana Oil with the idea of charging commissions on sales to that company. However, he did not succeed, except in one case (Cline, R. 636, 664).

[13]Buckley, R. 577; Cline, R. 623.

[14]Cline, R. 624.

[15]Cline, R. 623; cross, R. 668.

[16]Cline, R. 624.

[17]Cline, R. 639.

The first man I talk to may tell me he has 10 cars of gasoline to move, and he is not going to sell a car of it under 4¾¢ a gallon. Then I go to the next man. He has five cars he wants to move, and he wants to get 4¾¢, but he will take 4⅝¢. And I go on down the line. Maybe I will come to one man that has 40 cars of gasoline on hand and wants 4⅝¢, which he considers the market, but he has to move that gasoline within the next 24 or 48 hours to prevent a shutdown, and he might tell me, "If you cannot get that, and you hear of anything else, let me know." That might be the same specification of gasoline as this first fellow that wanted 4¾¢.[18]

I get all that information on my desk. I find that most of the refiners want 4⅝¢ for their gasoline that week; that is the consensus. Then when the buyers call me or I contact the buyers I use that 4⅝¢ price as a basis to try and sell them. If we get together with the buyers on that basis, I take the orders and distribute them around to our members. But if I contact one buyer, or some buyer contacts me, and he says, "Now, I have got an order for 25 cars of gasoline, but I will only pay 4½¢ for it, that is all my people will let me pay," I tell him that I cannot handle that, but I tell him he might call this other refiner who has already told me that he wished to move some material at a lower price if he could not move it all at the market, and I say, "If you ask that man I believe you will get your 25 cars." I might tell him, "I know one refiner down here that will probably take that, and I will have him call you right away," and I have him do it.[19]

Now, those 25 cars I would not consider as handled through the Association. The other orders

[18] *Ibid.*

[19] Cline, R. 639-40.

that I got at 4⅝¢, which was what the majority of our people wanted that day, I consider as fair spot market price sales, and charge commission on them.[20]

I don't know whether the major companies usually told me the prices that they would pay. There were a great many instances when they did, and a great many instances when they called me and told me they would need some material and asked what they could buy it for.[21]

These buyers that I dealt with would quite often call me on Mondays, because most of them bought gasoline the first part of the week for their week's requirements. They would ascertain from me what they could buy gasoline for in the field and maybe 2 or 4 hours later, or the next morning, they would call me and have an order at a specified price. So they would specify the price which they would pay for the gasoline. In a lot of the cases it was based on information that they had previously obtained from our office.[22]

We had no understanding as to what any major company was going to buy for the following week. Each order they gave us was a spot order, and we hoped they would continue buying every week, but we had no intimation from them that they would.[23]

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Bradshaw [the purchasing agent who bought for Gulf] might call me on a Monday morning and tell me he has an order for 50 cars of gasoline. He would either tell me, "I can pay 4½¢ for this gasoline," or he will say, "What can I buy it for?" If he tells

[20]Cline, R. 640.
[21]*Ibid.*
[22]*Ibid.*
[23]Cline, R. 641. See also Cline, R. 652-3.

me he can pay 4½¢, I try to get it for him, if that is what we consider a fair market price. And if he asks me what it is going to cost him, I give him the prices that the members of our Association have given to me.

On quite a few orders I have handled, a buyer like Mr. Bradshaw has called me and given me an order for 50 cars of gasoline, we will say, and has told me that he will pay such and such a price for it; and then I have called up the members of our Association and have said, "I have an order here for 50 cars of gasoline; you can have 10 of it, or 15 of it, and the price is so and so," but the member of our Association has already told me that he was willing to sell gasoline at that price.[24]

Cline tried to keep close track of prices in the field[25] and he based his estimates of the going market on those prices.[26] He neither took nor read the Oilgram until December, 1935, and he never used it as a basis for determining price.[27] He made a check just before testifying and found that 30 or 40 per cent of the sales made through the Association had been at prices below the low quotations in the market journals.[28]

Cline also acted as a clearing house for information like any other sales manager. If the buyers asked him, he told them about the condition of the various refiners, whether they were sold up on gasoline, what they considered the market to be, how much surplus there was in the field, who was buying and any other information he might have.[29]

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[24]Cline, R. 641-2.
[25]Cline, R. 625.
[26]Cline, R. 628.
[27]Cline, R. 625, 628.
[28]Cline, R. 659, 660.
[29]Cline, R. 640-1.

He also tried to follow up Buckley's contacts with major companies and promote sales through the Association.[30] He called Bradshaw, the purchasing agent, who bought for Gulf, several times a week,[31] W. A. Tracey of Sinclair,[32] and R. O. Audrain of Tide Water[33] about once a week, D. K. Chamberlain of Pure somewhat less frequently.[34] On one occasion he also saw R. Williamson of Continental.[35]

None of the men whom Cline called ever promised to buy more than a week's supply at a time[36] but they occasionally gave some intimation of their future intentions. Thus Bradshaw said that he would be glad to use the Association as much as he could. He did make most of his purchases for Gulf through the Association, but he handled his other purchases through other channels.[37] Tracey told Cline on several occasions that Sinclair was very short of gasoline and would probably be buying considerable quantities from month to month.[38] Audrain once told him that Tide Water was assembling a cargo on the Gulf and that they expected to buy at least a portion of the material from East Texas and would probably be buying for several weeks. Later he said that they were going to assemble another cargo, thus continuing in the market for several weeks

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[30]Cline, R. 637.

[31]Cline, R. 638.

[32]Cline, R. 637-8.

[33]Cline, R. 654.

[34]Cline, R. 638.

[35]Cline, R. 653.

[36]Cline, R. 640, 641.

[37]Cline, R. 638, 653. Cline was under the impression that Bradshaw had handled all his Gulf purchases through the Association (Cline, R. 638), but a Government audit showed that he had made about 38 per cent of them through other channels (W. J. Miller, R. 881).

[38]Cline, R. 653.

more.[39] Sometime in April Chamberlain told Cline that Pure would require a certain number of cars, and that he would order so many cars a week over a month. Later on he told him that Pure would need gasoline for its refinery on the Coast and would be buying pretty constantly through the summer.[40] Williamson told him that if they could get the right specifications, Continental would call on the Association whenever it had difficulty in making purchases for their East Texas stations.[41] Subsequently Williamson told him that the refiner with whom Continental had been dealing had temporarily shut down, and asked him for help in locating gasoline. Cline referred him to Gilliland, and Williamson said he would buy if they could get together on the price.[42]

There are general references in various letters written by officers or employees of Pure, Tide Water and Cities Service to a "buying program in East Texas,"[43] "this movement for the benefit of all,"[44] "a general buying movement,"[45] and "regular weekly purchases from the East Texas group."[46]

A Tide Water letter refers to "regular weekly purchases from the East Texas group."[47] A letter from Chamberlain of Pure to his associate C. W. Snider, states that he expected to receive from Buckley "a complete

[39]Cline, R. 654.
[40]Cline, R. 646.
[41]Cline, R. 653.
[42]Cline, R. 667.
[43]Govt. Ex. 272, R. 2894, and Ex. 487, R. 2997.
[44]Govt. Ex. 488, R. 2998.
[45]Govt. Ex. 454, R. 2986.
[46]Govt. Ex. 284, R. 2924.
[47]Govt. Ex. 272, R. 2894.

resume of allocations and purchases" and refers to "our allocation of five cars per day."[48] Snider's reply states that Pure really needed the gasoline which it was buying in East Texas, but indicates that Pure might discontinue its purchases in that area if the other major companies did so.

In fact only three of the respondents ever purchased through the Association.

3. *Prices paid by the respondents to independent East Texas refiners.*

Cline, the assistant secretary of the Association, determined what price he would demand for gasoline sold through the Association by asking the members how much they wanted for their gasoline. When the purchasing companies called up, they could either accept or refuse his price.[49] If they refused it, Cline would give them the names of independent refiners who might be willing to sell at a lower price. The purchasing company would then contact those refiners and they would bargain.[50] Cline estimated that during the first year of the Association's existence, he was responsible for the sale of more than a thousand tank-cars in this way.[51] The fact that this method of dealing did not result in a uniform selling price appears from the chart of East Texas purchase prices submitted by the respondents.[52] During the last ten months of 1935 there were at least fifty-four occasions when two, three or four different prices were paid on the same day. On more

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[48]Govt. Ex. 488, R. 2998.
[49]Cline, R. 642.
[50]Cline, R. 640.
[51]Cline, R. 666.
[52]Def. Ex. 1011, R. 3783.

than 40 per cent of the days on which more than one purchase was made during this period, two or more different prices were paid.[53]

The Government's figures showed that the respondents, excluding Sinclair, had purchased 7,492 tank-cars of gasoline on a flat price basis in East Texas between March 1, 1935, and April 30, 1936.[54] Of these, 2,023 had been purchased at prices which were below the low quotations carried by Platt's Oilgram for the East Texas market, 5,430 had been purchased at the low quotations, and 39 had been purchased at a price of ⅛ cent above the lowest quotations.[55] The respondents proved that even this last figure was erroneous as to all but four cars,[56] and that they had been purchased by a company—Socony-Vacuum—which the indictment does not allege participated in this program. The respondents consolidated the 1935 purchases of all the defendants then under indictment (including Sinclair) in Exhibit 1011.[57] As that exhibit shows, there was only

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[53] *Ibid.*

[54] Govt. Ex. 749, R. 3274.

[55] Govt. Ex. 748, R. 3272; W. J. Miller, R. 884.

[56] J. D. Miller, R. 1566-73. Of the remaining 2 cars, one was not checked because it had been bought by a dismissed defendant (J. D. Miller, R. 1568-9), and the other had been ordered under special specifications—"6-62 gravity, 400° end point material"—which ordinarily command a premium of ⅛¢ (J. D. Miller, R. 1573). The Government also compared the prices which the respondents had paid in East Texas with the Chicago Journal of Commerce quotations for the Group 3—Oklahoma market. (The Journal does not publish quotations for the East Texas market.) This study showed that 1549 tank-cars had been purchased at prices which were more than ⅛¢ below the Journal's low quotations, 4554 at prices which were ⅛¢ below the law, 1373 at the low quotations, and 16 at ⅛¢ above the low quotations. (Govt. Ex. 749, R. 3274; W. J. Miller, R. 885.). The respondents' auditors checked 15 of the 16 tank-cars last mentioned, and found that the Government was in error as to 10 of them. (J. D. Miller, R. 1566-73.)

one day during the entire year 1935 when any major company purchased gasoline from an independent refiner in East Texas at a price which was above the lowest current quotation in Platt's Oilgram. The three purchases on that day, April 8, 1935, were made by the same respondent and aggregated only five cars. The price was equivalent to the high quotation of the Oilgram. On the other hand, there were hundreds of cars, constituting a very substantial percentage of all those bought throughout the year, purchased at prices ranging from 1/8¢ to 5/8¢ below the lowest quotations.[58] When the quotations were rising in March, April and May, 1935, the prices paid by the respondents lagged behind, being almost invariably 1/8¢ below the low quotations.[59]

Cline testified that from 30 to 40% of the sales through the Association were made at prices below the low quotations in the market journals.[60]

4. *Amounts purchased.*

The indictment charges that the defendants bought more than 50% of all the gasoline produced by the East Texas independent refiners.

The only respondents who purchased in East Texas through the Association are Pure, Sinclair and Continental. Cities Service Export and Tide Water Oil, which were dismissed because they had been dissolved or reorganized, also made purchases through the Association.

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[57]J. D. Miller, R. 1614-5. Prior studies compared the prices paid by Cities Service Export and Pure with the quotations. (Def. Ex. 716, R. 3183; Buckley, cross, R. 615; Def. Exs. 741, 857, 858, R. 3237, 3417, 3421; Westcoat, R. 1140-1.) These studies were subsequently consolidated with the master study described above.

[58]Def. Ex. 1011, R. 3783; J. D. Miller, R. 1617.

[59]Def. Ex. 1011, R. 3783; J. D. Miller, R. 1617.

[60]Cline, R. 659.

Gulf and Texas had made large purchases from independent refiners in East Texas, but under circumstances which clearly showed that they were no part of a general program.[61] Neither Tide Water Associated nor Cities Service, which are alleged to have participated in the program, purchased in East Texas at all.[62] At the close of the Government's case, the court directed verdicts in favor of Gulf and Texas,[63] and the Government itself had the indictment dismissed as against Tide Water Associated.[64]

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[61]Gulf purchased 2,291 tank-cars through the East Texas Association and 1,191 tank-cars elsewhere in East Texas during the indictment period. Cline, R. 663-4; Govt. Exs. 747, R. 3270; 748, R. 3272, 3273; and 749, R. 3274, 3275. Alternative figures (also introduced by the Government): R. 2214 and 1321 (W. J. Miller, R. 881). The purchases through the Association were, however, made by J. M. Bradshaw, an independent purchasing agent, on his own initiative, and not as a result of directions from Gulf. (Bradshaw, R. 680; cross, R. 701.) Bradshaw had been solicited by both Buckley and Cline (Buckley, R. 592-3; Cline, R. 638). As described above, Buckley and Arnott had asked various Gulf officers, including H. V. Hartmann, the vice-president of the company, to purchase through the Association, but Hartmann had left the decision to Bradshaw (Buckley, R. 584-5, 591, 592; Arnott, R. 1722.) Texas purchased 1,240 tank-cars in East Texas, but none of them through the Association. (Govt. Exs. 747, R. 3270; 748, R. 3272, 3273; and 749, R. 3274, 3275; Cline, R. 665.) The Association collected commissions on some 800 tank-cars which its members sold to Texas (Cline, R. 663, 664). These commissions, however, were voluntary contributions by the members to the support of the Association, and did not mean that the Association had had anything to do with the sales (Cline, R. 631, 633).

[62]Govt. Exs. 747, R. 3270; 748, R. 3272, 3273; and 749, R. 3274, 3275. As to Govt. Ex. 1032, R. 3878-9, which purports to show certain purchases by Cities Service, W. J. Miller, the Government accountant, testified that they might have been made by Cities Service Export (W. J. Miller, cross, R. 1854). Buckley testified that the Export Company was the only Cities Service Company which bought in East Texas (Buckley, R. 609).

[63]R. 912.

After the verdict, the court granted Cities Service a new trial.[65]

The major companies which purchased through the Association also bought over 1,000 tank-cars of East Texas gasoline (over 12% of their total purchases) through other channels. At least 675 tank-cars of this were purchased from non-members of the Association.[66]

In 1935 the East Texas refiners named in the indictment sold 285,592,188 gallons of gasoline.[67] The respondents bought only 40,195,754 gallons or 14.07% of this total production.[68] In the same year all the independent refiners in East Texas produced 378,920,346 gallons of gasoline.[69] The respondents purchased only 45,598,543 gallons or 12.03% of this.[70]

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[64]R. 901-2.

[65]R. 2488, 2491.

[66]J. D. Miller, R. 1642, 1643. Presumably the figure was much higher, for no figures are available as to the amounts which the dismissed defendants, Gulf, Texas, Cities Service Export and Louisiana Oil purchased from non-members of the Association.

[67]Dyer, R. 1467.

[68]J. D. Miller, R. 1642. This allegation of the indictment is extremely inaccurate even if the purchases of those companies as to whom the indictment was dismissed are added to the purchases of the respondents. In that case, the total purchases were less than 30% of the production of the East Texas refiners named in the indictment.

[69]Dyer, R. 1467.

[70]J. D. Miller, R. 1642, 1648. Even if the purchases of the companies as to whom the indictment was dismissed be added to the purchases of the respondents, less than 25% of the production of all the independent refiners in East Texas was purchased. (*Ibid.*) The Government attempted to show by figures based upon the records of the Federal Tender Board that the defendants, excluding Gulf and Texas (as to whom the indictment had been dismissed), had received some 23.8% of the tank-cars shipped out of the East Texas field between March 1, 1935 and March 3, 1936, and that the de-

5. Amounts manufactured by the independent refiners.

The indictment charges that, at the instance of Arnott and Buckley, the East Texas independents curtailed their production.[71]

Travis testified that neither Arnott nor Cline had ever asked him to curtail his refinery runs.[72]

Buckley described a speech which he made to the East Texas refiners at a dinner in February, 1936, as follows:

> "I reviewed the activities of the Association during the past year, as I had recalled them, from the time I had been associated with them. I told them that they were then in a very trying period of their existence; that the Bureau of Mines and various other agencies were calling attention to the fact that stocks of gasoline were very high, that the markets at that time couldn't absorb them, and various trade journals were preaching curtailment, and that everyone interested in the industry, was asking for stabilization of operations.
>
> "I told them that I never had and never would tell any man how to run his business, but that as

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fendants originally indicted had received 43.8% of such interstate tank-cars. (Govt. Ex. 1032, R. 3878-81; W. J. Miller, R. 1849-50.) However, these figures related only *to interstate shipments in tank-cars* and excluded intrastate shipments and shipments by trucks. Whereas the Government's figures showed only 24,052 tank-cars being shipped out of the East Texas field during this period, the respondents proved that the total shipments, by all methods, had been 378,920,346 gallons or the equivalent of 47,365 tank-cars. (Dyer, R. 1466-7, 1469-70.) (See also Cline's estimate, R. 666.) Applying the figures in the Govt. Ex. 1032 to this total, the percentage bought by the defendants, excluding Gulf and Texas, would be 15.2% or slightly higher than the respondents' figures. The percentage for all the defendants, including Gulf and Texas would be 22.2%.

[71]Indictment, paragraph 21, R. 14-5.

[72]Travis, R. 1128-9.

I viewed the situation, there were three or four courses open to them.

"They could shut down, and sell the crude oil; or they could continue to run on part time, and store the balance of their crude oil for better markets; or they could curtail their operations and sell part of their gasoline and store the rest of it; or they could run their heads off and dump the gasoline for the best price they could get; that it was their choice and I had no recommendations; every man had to make the choice for himself. * * *"[73]

An audit of the records of the Texas Railroad Commission and the Federal Tender Board showed that the output of the East Texas refiners named in the indictment increased substantially during the period of major company purchasing. The actual figures were as follows:[74]

Nov. 1934-Feb. 1935 (Incl.)	56,473,956 gallons
March-June, 1935 (Incl.)	81,299,358 gallons
July-Oct. 1935 (Incl.)	114,209,676 gallons
Nov. 1935-Feb. 1936	99,654,308 gallons

F. Buckley's subsequent activities.

Throughout 1935 and up to May, 1936, Buckley continued his attempts to persuade major companies to buy gasoline from the East Texas Marketing Association.[1]

He contacted Bradshaw, the Gulf buyer, and urged him to buy through the Association.[1a] Late in March he talked with a Continental man but the latter said that the matter

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[73]Buckley, R. 613-4.
[74]Dyer, R. 1467-8, 1469-70.
[1]Buckley, R. 592, 594.
[1a]Buckley, R. 586-7, 589.

would have to be referred to the company's headquarters in Ponca City.[1b] A week or so later Buckley attended the annual meeting of the Western Petroleum Refiners' Association at Excelsior Springs, Missouri. There he received an introduction to E. Karstedt of Continental, who told him that he would not buy any gasoline in East Texas under any circumstances.[2]

On April 7, 1935, Buckley saw Arnott at the Excelsior Springs Convention, and told him that there had been some developments, but nothing very encouraging. He said that his work for the Association had compelled him to neglect his duties with Cities Service Export, and that he would have to give up the Association work and devote his full time to his job. Arnott felt that Buckley's work had been very valuable in bringing understanding and stabilization into the East Texas situation.[3] Buckley wanted to have another talk with Arnott, and the latter told him that he would let him know if he held any meetings with potential purchasers.[4]

On April 8, 1935, Buckley reported this conversation in a letter to Brandli.[5] He stated that during the next two weeks he and Arnott were going to try to convince at least two or three buyers of East Texas gasoline of the necessity of establishing a method of buying which would eliminate the present hand-to-mouth basis. It had been

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[1b]Buckley, R. 592-3.

[2]Buckley, R. 592, 594. Later Buckley told Cline to follow up with Continental's office at Fort Worth and see if he could persuade them to buy through the Association. *Ibid.*

[3]Arnott, R. 1723.

[4]Arnott, R. 1725.

[5]Govt. Ex. 18, R. 2620.

suggested that this might be done at a meeting at Atlanta on April 10, or perhaps in New York on the 11th. He concluded by saying that unless he saw Arnott by the 15th he would write him of his necessary retirement and suggest the name of a successor.

Arnott, on his way to Atlanta to deal with price wars in the southeast, had already wired Carnes of Sinclair:[6]

> "Have today reviewed situation with Buckley. Necessary you, he and I go over program together and do some planning. Advise you bring your records with you and be prepared to go into matter at Atlanta Thursday. • • •"

Arnott thought that if Buckley were going to retire, he could come to Atlanta without much trouble and follow up their Excelsior Springs conversation by telling Carnes and Arnott his ideas as to the continuance of the Association's work and the probable future conduct of the refiners.[7] Carnes, having an expert representative in East Texas (W. A. Tracey), would be likely to have reliable information and up-to-date figures as to conditions there.[8]

Buckley was unable to reach Atlanta.[9] Within the next few weeks, however, Arnott did try to convince several buyers of the desirability of regularity in buying. He pointed out that the buyers were giving little regard to when they placed their orders, and that if they were a bit more systematic, it would help the refiners who had to dipose of their product at the time it was produced.[10]

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[6]Govt. Ex. 369, R. 2976; Arnott, R. 1724.
[7]Arnott, R. 1724.
[8]Arnott, R. 1725.
[9]*Ibid.*
[10]Arnott, R. 1724.

At about this time Buckley talked with J. A. Welch of Louisiana Oil Company. Welch told him that Louisiana had an arrangement of some sort with the Grogan Oil Company and that they would not be interested in purchasing through the Association until this arrangement expired. Subsequently, on several occasions he talked with Brakefield of Louisiana and tried to get him to buy in the field but the latter still preferred to deal directly with Grogan.[11]

About the middle of April Buckley wrote Arnott saying that he would have to give up his work for the Association.[12] On May 17, he wrote Brandli[13] saying that the day before he had again advised Arnott of the necessity of discontinuing his work for the East Texas refiners, and had requested relief not later than the end of May. Arnott had stated that he would advise Buckley whether he wished a final report to be made in New York prior to the relinquishment of the assignment. In May, 1935, Buckley went to New York.[14] On the 27th, he saw Arnott and told him that he had resigned his position with the Association.[15] After Buckley had left, Arnott saw his superior, Coates, who was a member of the Planning and Coordination Committee, and expressed appreciation on behalf of himself and the industry for the fine work Buckley had done. Coates said he was glad to know that Buckley had been so helpful.[16]

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[11]Buckley, R. 595.
[12]Arnott, R. 1724.
[13]Govt. Ex. 21, R. 2624
[14]Buckley, R. 589.
[15]Arnott, R. 1725.
[16]Arnott, R. 1725-6.

That same day this Court invalidated the enforcement provisions of the N. I. R. A. in the *Schechter* case.[17] At Arnott's invitation, Buckley attended and spoke briefly at a meeting on May 29th to discuss the decision.[18]

Buckley continued his activities in behalf of the Association along the same lines as before. His activities included advertising the Association, trying to persuade the major companies to buy from it, and interceding in disputes between buyer and seller.[19] During the summer he called McElroy of Pure, pleading for a let-down in Pure's rigid specifications. Later, Chamberlain of the same company called him and said that McElroy had referred him to the Association. He had called Cline and the latter had told him that two or three refineries in the field could meet their specifications.[20] In the fall of 1935, having heard that Texas was going to buy a considerable quantity of gasoline in East Texas, he called P. C. Scullin of that company on the telephone and asked him if he could let the Asociation help him assemble the gasoline, but Scullin refused.[21] At about the same time he again approached Continental.[22] In October, 1935, he made a trip to New York.[23] In a letter to Brandli[23a] he said that Arnott had invited him to attend a meeting there to report on the status of the East Texas situation.

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[17]Arnott, R. 1726. See 295 U. S. 495.

[18]Arnott, R. 1726. The meeting was attended by approximately the same group which had attended the March 15th meeting (Arnott, cross, R. 1748).

[19]Buckley, R. 589, 590.

[20]Buckley, R. 592, 593-4.

[21]Buckley, R. 591, 593.

[22]Buckley, R. 594.

[23]Buckley, R. 589.

[23a]Govt. Ex. 32, R. 2634.

Even after October, Buckley continued to make telephone calls on the Association's behalf until April, 1936.[24] In November, 1935, he went to the American Petroleum Institute Convention in Los Angeles at the request of the East Texas Refiners.[25] There he approached Arnott, saying that the Association had told him that several refiners were in a very desperate plight for need of orders and asking if Arnott knew of anyone who might help. Arnott replied that he didn't know offhand, but that he would be glad to see what he could do. Subsequently, he communicated with several large buyers but it does not appear whether they bought.[26] Buckley also met H. J. Kennedy of Continental at the convention, and asked him to have his Forth Worth office deal through the Association.[27]

In January, 1936, Buckley telephoned Arnott from Tulsa; saying that several refiners were in need of orders, and mentioning that Cities Service and one or two others might be in the market for gasoline. Arnott wired Cities Service as follows:[28]

> "East Texas situation needs prompt handling in order to keep in line need your help very much. What we need is your orders for fifty cars. Will you give me your help? Answer Roosevelt Hotel New Orleans."

Cities Service, however, did not buy.[29]

In April, 1936, the refiners asked Buckley to approach the major companies once more and to ask companies which

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[24]Buckley, R. 589.
[25]*Ibid.*
[26]Arnott, R. 1726-7.
[27]Buckley, R. 592, 594.
[28]Govt. Ex. 35, R. 2634; Arnott, R. 1727.
[29]Govt. Ex. 747, R. 3270.

were not buying through the Association to come in and buy. After attending a dinner in East Texas, Buckley went to Houston and called on two or three people, including Scullin of Texas. He told them that the Association was still operating and gave them his opinion of it.[30]

At this point Buckley ceased all activities on behalf of the Association.[31] The East Texas Refiners' Marketing Association, however, continued to function as described above long after the indictment and at least until the time of trial. None of its officers, employees, or members was indicted.[32]

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[30]Buckley, R. 589, 591-2.
[31]Buckley, R. 589.
[32]Cline, R. 668.

VI.

The Accuracy of the Market Journal Price Quotations.

Paragraph 24 of the indictment alleges that the market journals, the Chicago Journal of Commerce, Platt's Oilgram, and National Petroleum News, had been the chief agencies and instrumentalities through which the prices paid by the major oil companies had affected the prices paid by jobbers, retail dealers, and consumers for gasoline in the Mid-Western area. It alleges,[1]

> "* * * While representing the price quotations published by them, as aforesaid, to be gasoline prices prevailing in spot sales to jobbers in tank car lots, and while knowing and intending them to be relied on as such by jobbers and to be made the basis of prices to jobbers for gasoline in the prevailing forms of jobber contracts in the Mid-Western area * * * they have * * * knowingly published and circulated as such price quotations the wrongfully and artificially raised and fixed prices for gasoline paid by the defendant major oil companies as aforesaid in the said East Texas buying program and Mid-Continent buying program."

The Government produced no evidence to show that either of the trade journals had ever published a price paid by a major company as a price paid by a jobber or consumer on the spot market.[2]

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[1]R. 17.

[2]The Government originally sought to prove these allegations, not by proving that the market journals had ever published a price paid by a major company, but by proving that *sales on the spot market or in comparable markets had sometimes taken place at prices*

Both the Chicago Journal of Commerce and Platt's Oilgram had collected information about inter-refinery

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below the published quotations. C. O. Beroth, a Chicago broker, testified that he had been able to obtain good quality gasoline at prices ranging from ¼ to ⅞c. below the low quotations in the Chicago Journal of Commerce. (Beroth, R. 191-2, 196-7). The normal discount on sales to brokers was only ⅛ to ¼c. (Beroth, R. 178, 191.) Since Beroth did not cite any specific instances of purchases at the prices he had mentioned, it was impossible to check his statements. William Lanzer, another broker, testified that he had sold 65 octane gasoline for prices as low as ½c. under the low quotations for regular gasoline in the Chicago Journal of Commerce. (Lanzer, R. 250.) It appeared, however, both from his own testimony, and from that of other witnesses, that 65 octane gasoline was *not* regular gasoline, that regular gasoline had an octane rating of from 68 to 70, and that 65 octane gasoline *normally* sold for ¼¢ less than regular. (Lanzer, cross, R. 260, 267-70; Steiger, R. 732-3.) Lanzer insisted that he had made sales lower than the Journal quotations for comparable grades of material, but, like Beroth, gave no specific instances. (Lanzer, redirect, R. 272.) He also testified that he had bought gasoline in East Texas at prices below those being quoted in the market journals. Here again, however, it appeared either that he was talking about 65 octane gasoline (Lanzer, R. 247, 250; cross, R. 260-1, 267-70), or that he was attempting to compare the prices paid with the Chicago Journal of Commerce which publishes no quotations for the East Texas field. (Lanzer, R. 247, 250, 272. See W. J. Miller, R. 351-2.) Oscar Peterson, a jobber, testified that he had both bought material in the open market (Peterson, cross, R. 300-3) and resold it (Peterson, cross, R. 303) at prices below the low quotations in the Journal of Commerce. It appeared however that a great deal of the gasoline bought had been 65 octane material or gasoline from East Texas (Peterson, R. 300-3) and that in any case the same conditions had obtained before the buying program began. (Peterson, cross, R. 300-3.) As to the gasoline sold, it appeared that 550 out of 949 cars had been sold at or above the low quotations in the Journal, and that even these figures included 76 cars sold to brokers who would normally buy below the market. (Peterson, cross, R. 303.) J. M. Bradshaw, a buying agent, testified that he had bought some gasoline in East Texas at prices below the trade journal quotations. He admitted, however, that the gasoline in question was off-specification material which would naturally be cheaper. (Bradshaw, R. 685.)

purchases and sales and reported them as *news items.*[3] The Oilgram's representatives discussed such purchases with, and obtained information from Jacobi, Fitzgerald, Bourque, Buckley, Cline and employees of the purchasing companies.[4] But *there was no evidence that either trade publication had ever published a price paid by a major company as a price paid by jobbers on the tank-car market.*

John E. Steiger, the market checker for Platt's Oilgram, testified that he was primarily responsible for the quotations published in that journal.[5] He testified that not only the low, but the high quotations in the Oilgram represented actual sales to jobbers on the open spot market. He did not recall any day in which there had not been sales at the level of the high quotations.[6] J. P. Mosher, Steiger's superior, testified generally to the same effect.[7]

Steiger regularly checked the prices reported to him by independent refiners against three other sources of information:

1. The Purity Oil Company, of Springfield, Missouri, one of the few jobbers in the vicinity.
2. Information assembled by the Oilgram's Chicago office which was in close touch with the jobbers in the consuming area.
3. Brokers, who generally bought at about ⅛ cent be-

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[3]McDowell, R. 1189; Steiger, R. 742.

[4]Evans, R. 540; Cline, R. 665; Steiger, R. 746-7, 749-50; 753-4, 781-2.

[5]Steiger, R. 728-31.

[6]Steiger, R. 780-1.

[7]Mosher, R. 791-2.

low jobbers, and so could tell him whether the jobber prices reported by the refiners were out of line.[8]

Government counsel repeatedly suggested to Steiger that he might have encouraged the independent refiners to report the prices they had received in sales to major companies with the prices they had received in sales to jobbers. He denied this unequivocally.[9] He testified, the Oilgram always asked for sales to jobbers. It had given the independent refiners general instructions that it wanted only jobber prices[10] and had repeated these instructions from time to time during 1935 and 1936. He himself had insisted that the refiners segregate their sales to major companies from their sales to jobbers[11] and he believed that they had done so.[12]

At the close of its case the Government itself moved to have the indictment dismissed as to the market journal defendants on the ground that it had "been unable to adduce sufficient evidence to connect up those defendants with the conspiracy charged in the indictment."[13]

In the course of the presentation of the defense an audit was submitted showing that the trade papers accurately reflected the prices being paid by jobbers and con-

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[8]Steiger, R. 745-7. In making these checks, the Oilgram did not attempt to get both buyer's and seller's figures on the same transaction. It merely compared the prices reported to it by the selling refiners with the prices reported by the jobbers and brokers generally. (Steiger, R. 747.)

[9]Steiger, R. 770-4.

[10]Steiger, R. 769-71.

[11]Steiger, R. 769-70.

[12]Steiger, R. 770.

[13]R. 902.

sumers in the spot market and that the respondents paid different and lower prices from those being paid by jobbers and consumers. The results of the audit are set out graphically in Exhibit 1024.[14]

In their closing argument to the jury Government counsel conceded that the purchases under the buying programs were generally made at or below the competitive market prices being paid by jobbers. Here is what they said:

> "• • • So that the major companies bought at the low the majority of their purchases in these pools, bought them at the low of the journal, or chiseled below that and bought them an eighth or a quarter of a cent under the low • • • ."[15]
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> • • • •
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> "Now, how did the proof develop? And that is the thing we are concerned with here, how the proof actually developed; and it was this: The major companies were buying at the market • • • ."[16]

As a result of the Government's concessions, the issue of misrepresentation by the market journals was removed from the case when it went to the jury. It should be noted, however, that the matter was further clarified by the evidence on the issue of whether the respondents had paid "high, arbitrary and non-competitive" prices for the gasoline which they bought.

As stated above, *the Government's own evidence* showed that:

(1) In East Texas only 39 out of 5,430 tank-cars, or less than 1 per cent, had been bought at prices

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[14]R. 3807.
[15]R. 2061.
[16]R. 2312.

above the *low* quotations in Platt's Oilgram. 2,062 or 27 per cent had been bought at prices *below* the *low* quotations.[17]

(2) In the Mid-Continent, only 984 out of 9,204 tank-cars, or about 10 per cent had been bought at prices *above* the *low* quotations in *either* market journal. 2,052 tank-cars, or over 22 per cent, had been bought at prices *below* the *low* quotations in *both* market journals.[18]

(3) That no substantial amount of gasoline could have been purchased at prices *above* the *high* quotations in either field. Not a single tank-car had been purchased in East Texas at more than ⅛ cent above the low quotations.[19] Only 48 tank-cars, or 0.7 per cent of the total had been purchased at more than ⅛ cent above the low quotations in the Mid-Continent.[20]

Thus, the Government's own figures show that the market journals did not publish the prices being paid by the respondents. If they had, the great number of purchases being made below the low quotations would have overborne the few being made above the low quotations and *the quotations would have been lower than they were.*

The respondents' audits (Defendants' Exhibits 1011 and 1024) went even further than this. They showed that if the Oilgram had published the prices paid by the respondents in June, July and August, 1935, their quotations would have broken from a range of 4⅝-4¾ cents to

[17]Govt. Exs. 747, 748 and 749, R. 3270-5.
[18]Govt. Exs. 750 and 751, R. 3276-80.
[19]Govt. Exs. 747, 748 and 749, R. 3270-5.
[20]Govt. Exs. 750 and 751, R. 3276-80.

one of 4½-4⅝ cents with occasional drops as low as 4 cents.[21]

In the Mid-Continent, the percentage of major company purchases at prices below the low quotations was higher during March, April and May when the price rise occurred than during the indictment period as a whole. The percentage of prices above the low quotations was lower during the former period than during the latter.[22] In other words, the prices paid by the major companies would not account for either the price rise in the spring of 1935 or the price decline in the spring of 1936. There were no purchases of regular gasoline at prices above the high quotation during 1935. During most of the year there were no major purchases of regular gasoline at all, and it would have been impossible for the market journals to have used the price paid in such transactions.[23]

Finally, as mentioned above, the respondents' audit showed that the market quotations in the trade journals actually represented the prices at which the vast majority of sales were being made to jobbers and consumers on the open spot tank-car market. 76 per cent of the spot sales which the independent refiners had made to jobbers and consumers had been made at the high quotations in the market journals, or between the low and the high quotations, or at the low quotations. 8 per cent had been made at prices which were above the high quotations.[24] Not only, therefore, did the trade journals ignore the prices paid in sales to the respondent companies, but they accurately reflected the prices paid in sales to jobbers and consumers.

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[21]Def. Ex. 1011, R. 3783; J. D. Miller, R. 1617; cross, R. 1617.
[22]J. D. Miller, R. 1663.
[23]Def. Ex. 1024, R. 3807; J. D. Miller, R. 1661-2, 1669.
[24]Def. Ex. 1024, R. 3807; J. D. Miller, R. 1665.

VII.

The nature of the distress gasoline which the respondents purchased.

A. Definitions of distress gasoline.

The respondents purchased only distress or surplus gasoline.[1] Bourque's surveys showed only distress gasoline.[1a] The monthly meetings of the Tank-Car Committee dealt only with the distress gasoline revealed by Bourque's surveys.[2] The Mechanical Sub-Committee confined its activities to distress gasoline.[3] Jacobi testified that that was the only kind of gasoline purchased under the program.[4]

Cline, Fischer and Travis all testified that the only gasoline sold by the East Texas Refiners' Marketing Association was surplus or distress gasoline.[5]

The following definitions of distress gasoline appear in the record:

> "• • • it is the general rule among the so-called independent refiners not to have tankage for working stocks beyond a reasonable limit, and they do not usually have storage facilities beyond their necessary working stocks to take care of current business. • • •
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> "In times of overproduction, they are compelled to throw their product on the market at whatever

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[1]See pp. 105 *et seq.*, *supra*.
[1a]See pp. 85-6, 91, 101, 103, 106-7, 111, *supra*.
[2]See pp. 110-14, *supra*.
[3]See pp. 120-2, *supra*.
[4]Jacobi, R. 382, 384-5.
[5]Cline, R. 642, 644-5; Fischer, R. 1119; Travis, cross, R. 1129-30.

price it will bring. That gasoline is called distress gasoline in the trade." (Franklin, R. 929).

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"• • • From the standpoint of a small refiner, distress gasoline is a product which he has on his hands for which he has no immediate sale except at a price below the current market." (Shatford, R. 1003).

• • •

"• • • Distress gasoline is the part of any company's manufacture that it has no regular sales outlets for, and that it must sell at prices substantially below the market. • • •" (McDowell, R. 1166).

• • •

"Distress gasoline is gasoline that is forced on the market for one circumstance or another, usually at a lower price than that prevailing in the market. It is almost always due to a condition of over-supply, where the refiner is not in a position to finance the holding of that gasoline over a longer period of time." (Frey, R. 1327).

• • •

"• • • Distress gasoline is gasoline that is on the hands of the small selling refiners, in tanks or in cars on the track, for which they have no market except at distress prices." (Jacobi, R. 372-3).

• • •

"• • • The gasoline market is just like the spot market or the stock market; it is based on the law of supply and demand. A refiner is naturally interested in getting as good a price as he can. And the buyer is interested in getting as low a price as he can. The point where the two of them get to-

gether is the going spot market. As an example of a price that wouldn't be the going market price under that definition, supposing a refiner had 50 cars of gasoline that he had to sell before night, and he had to take the best price he could get for it. * * * That would be a distress price. The proper price would be whatever the normal trade was going at, whatever we were able to sell for regularly, day to day." (Cline, R. 628).

* * *

"* * * I don't believe I have made clear what we consider to be a surplus gasoline. Here is a refiner that makes 5 cars of gasoline a day; that is 35 cars a week. He is selling a certain number to jobbers, possibly brokers, week after week, and has been for an extended period of time. He knows just about how much business he will get from them each week. Suppose that totals 25 cars. Then there are 10 cars left over that he has no immediate home for. He could sell it in half a dozen places at a bargain price, at whatever he could get for it, or whatever the buyer he approached would pay. * * * That is what we consider, for the purposes of our Association, surplus gasoline. * * *" (Cline, R. 642).

* * *

"My understanding was that excess or surplus gasoline meant a surplus amount of gasoline for which it was hard to find a market, because there wasn't a demand for it. I presume the price had something to do with the difficulty in finding a market for it. I did not understand it to mean that it was more gasoline than they could find a market for at any price." (Bradshaw, R. 671).

* * *

"* * * Our ideas of surplus gasoline was the gasoline that was left over after the refiner's contract customers had taken out their requirements after his regular buyers in the open market had come in and taken theirs, and it was that gasoline left after thay had exerted all efforts to attempt to sell it. That gasoline left over was distress." (Steiger, R. 751-2).

* * *

"Distress gasoline is gasoline in the hands of a refiner who does not have a market for it and cannot hold it by reason of lack of finances or lack of storage capacity. * * *" (Gray, R. 1808-9).

In the following sections we shall discuss in detail exactly what the record shows as to the causes and effects of this phenomenon.

B. The independent refiners could neither shut down nor substantially curtail their operations.

The record shows that, in the language of the witness Franklin, the average independent refiner "has to keep [his refinery] running continuously or go out of business permanently. He has no choice in the matter."[1]

There are three reasons for this:

(1) The independent refiner obtains his crude oil under contracts which require him to take all the crude oil which the seller can legally produce. If he violates this provision in order to shut down or curtail operations, the seller may cancel the contract. A refiner whose contract has been cancelled

[1]Franklin, R. 930.

finds it extremely difficult to obtain a new supplier when he reopens his plant.[2]

(2) The independent refiner also has certain customers of long standing who look to him for supplies. A shut-down usually means the permanent loss of such customers.[3]

(3) Even if *some* curtailment is possible, it cannot be substantial. The costs of refining (outside of the cost of crude oil) are largely overhead costs. Any curtailment of production, therefore, increases the cost per unit sold. If, therefore, the curtailment is carried beyond a certain point, the cost per gallon becomes prohibitive.[4]

The testimony on these points was undisputed.

Wirt Franklin, a former independent producer and refiner, and the first chairman of the Planning & Coordination Committee under the Code[5] testified regarding the danger of losing crude oil connections and customers as follows:

"The independent producer who has not sufficient facilities for storage must sell the crude oil that he produces from day to day on a day to day basis if he continues to produce his allowable share of the production from the common pool.

"In order to take care of that, the oil is sold under what is known as a division order. That is a contract between the operator of the oil wells and

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[2]Franklin, R. 926, 930; Shatford Cross, R. 1077; Gray, R. 1827-8.

[3]Franklin, R. 930; Gray, R. 1828.

[4]Evans, R. 542-4; Gray, R. 1827.

[5]Franklin, R. 914-5.

the purchaser who usually owns the pipe lines that connect to the stock tanks. * * *

"The division order has a provision obligating the purchaser to take from the producer all the allowable oil on the lease which the division order covers. He has to take it as it is produced. He takes it from the tank. While they are filling one tank, they are usually emptying another into the pipe line. * * *" (R. 926).

"When the price of refined products goes down below the cost of operating, the small, independent refiner can't close down his plant until prices rise, unless he expects to go out of business permanently, because of a variety of reasons. The most important is that he would lose his crude oil connections in the field. If he once cuts loose from the producer, the producer has to seek some other market or outlet for his daily runs of crude oil. And if he shuts down, he will also lose his marketing outlets for his refined products, as some other refiner will immediately take over that business.

"As a general rule the independent refiner had certain customers that took from him pretty steadily. I know we did. We had other brokers and jobbers that bought from us from time to time. If we had shut down, those that were our steady customers would necessarily have had to go some place else to buy their gasoline and make other alignments and contracts with other people.

* * *

"It is a characteristic of the refining business that it is necessary for the average independent refiner to keep his refinery operating, regardless of the price of crude oil or the price which he obtains for his refined products. He has to keep it running continuously, or go out of business per-

manently. He has no choice in the matter" (R. 930).

John E. Shatford, also a former independent refiner, and the National Coordinator of refinery operations under the Code[6] testified as to the danger of losing crude oil connections as follows:

> "I made that point in connection with losing crude oil connections in this sense. If the small refiner shut his plant down and gave up his crude connections, someone else would step in and take it and then when he wanted his crude oil back, he could not get it. He would be without a supply of raw material.
>
> • • •
>
> "There has been a fluctuation in the operations of individual independents, so-called independent refineries, throughout their history, so far as I know. • • • I think within reasonable limits it is true that the amount that these independent refiners did produce, from month to month, varied through the year." (R. 1077).

D. J. Gray, the former manager of the Waggoner Refining Company, an independent refiner,[7] testified on the impossibility of substantially curtailing operation, and the danger of losing crude oil connections and customers as follows:

> "When conditions are bad and prices are low, some small refineries do shut down temporarily and some reduce their throughput. By 'throughput' I mean the amount of oil that they put through their

[6]Shatford, R. 995.
[7]Gray, R. 1808.

plants. But most refineries are one-unit plants, and have a maximum and a minimum at which they can operate. For instance, if you have a plant capable of turning out 2,000 barrels of gasoline a day through one unit, you might be able to produce 1,200 to 1,500 barrels a day economically, through that unit, but you couldn't go below that.

"A number of refiners have a pipe line gathering system through which they transport oil which they buy from the producer in the field. If they shut down their plant, they can't buy that fellow's oil, and he seeks another outlet for his oil. When they get ready to go back in business again, they have a whole system of pipe lines lying in the ground which they have to dig up and put some place else, providing they can find somebody else that will sell them the oil. It is quite frequently difficult to persuade somebody to sell you oil if they know you are a company that is liable to run this month and shut down next month. Therefore, you are forced to stand the punishment in the hope of better days.

"Frequently they have fuel oil contracts with the railroads, for 3 months, 6 months or 12 months, and the period which it was shut down makes it impossible for them to resume under those contracts, and they would probably have difficulty in getting new contracts when they start up again.

"It is like any other business when you break down all your connections, both with reference to selling products and the purchase of raw materials." (R 1827-8.).

The high unit cost of curtailed operations affected even companies which had their own supplies of crude oil and which could thus curtail operations without fear of losing

their crude oil connections. Barnsdall Refining Corporation (which produced 50% of its own crude oil)[8] kept one of its refineries shut down and purchased gasoline rather than incur the added costs of partial operations.[9]

None of these witnesses testified that *no* curtailment of operations was possible. Shatford recognized that there was "a certain amount of leeway".[9a] Gray testified that "some small refineries do shut down temporarily."[10] It is also clear from the record that there is a certain amount of curtailment in the fall and winter when demand is low. J. W. Warner, an employee of Tide Water Oil Company, made repeated reports to that effect during the fall and winter of 1935-1936.[11] It will be noted from Warner's let-

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[8]Evans, R. 507.

[9]"* * * We did not have enough gallonage to operate our 3 refineries at capacity all the time, and it became necessary some times to close one down. It was costing us more to make the gasoline than we could buy it for practically all the time.

* * *

"We had the crude oil and equipment to supply our own demands without going out in the market and buying from smaller refineries at that time, but it cost us more to make it than to buy it. We have 3 plants, and not enough business for all 3 of them, so we cannot run them all 3 together. We have more than enough business for 2, but not enough for the third. They cannot all at the same time be operating on a profitable basis. 2 of them operated every day of the year. The Okmulgee plant was the one where fluctuation occurred. There was a certain amount of investment in that plant, a certain number of employees there, and it was a proposition to close it down altogether. (Evans, R. 542-543.)

[9a]Shatford, R. 1077.

[10]Gray, R. 1827.

[11] "Present conditions of the market and the apparent scarcity of open market gasoline indicates that refiners are following a policy of keeping crude runs down to a level where no burden-

ters, however, that, in spite of curtailment, there were substantial amounts of surplus gasoline on the market. The curtailment which occurred in the fall and winter of 1935-1936 was clearly not sufficient to meet the seasonal decline in consumption. In fact, it left the refiners with as much surplus gasoline as before. The East Texas refiners manu-

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some gasoline stocks will accumulate. * * *" (Govt. Ex. 274, R. 2900.)

* * *

"The gasoline market early this week lost considerable ground as inter-refinery buying in the East Texas district failed to develop as was anticipated. As a result a surplus quantity of material accumulated, causing temporary anxiety among marketers as to the future trend of prices."

* * *

"Definite and reliable informations shows refiners in the East Texas field have lowered their crude runs to stills to a marked degree. This is believed to be good proof that this group of manufacturers see the necessity of a balanced market." (Govt. Ex. 276, R. 2906.)

* * *

"* * * Refiners, large and small, have continued to contribute this week toward the firmness of the present market by endeavoring to hold their gasoline production in line with seasonal market demands." (Govt. Ex. 277, R. 2909.)

* * *

"East Texas group of refiners were said to have a considerable amount of available gasoline at the end of the week, as inter-refinery buying failed to develop in the East Texas district sufficiently to absorb the quantity this group of refiners had to offer. The exact amount of surpus gasoline can not be readily confirmed; however, it is estimated at 100 cars."

* * *

"Observers are stressing the importance of a further reduction of refinery crude runs, as production is generally conceded

factured only 12.7% less gasoline, in November, December, January and February than in July, August, September and October.[12] Refiners in the Mid-Continent field (according to Government Exhibit 281 quoted above) did about the same.[13] The decline in consumption during these four months was *17.3%*.[14]

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to be too high in comparison with the present market demand." (Govt. Ex. 278, R. 2912.)

* * *

"Several marketers of Oklahoma and North Texas gasoline are in urgent need of orders, as shown by the fact that they have lowered their prices in an attempt to obtain quick shipping instructions, but with little success. Observers feel that some very definite action must be taken to clear from the open market all surplus gasoline. Unless this is done, a general breakdown in prices is probably, in spite of efforts of many manufacturers to keep production in line with the seasonal decline in market demand." (Govt. Ex. 279, R. 2915.)

* * *

"Marketers in general are advocating a further reduction in gasoline production. A recent survey by some observers of refinery operations for December in East Texas and other Mid-Continent districts indicates refinery crude runs are being reduced ten to twelve per cent under November. However, the percentage of decrease is reported estimated rather than actual calculations, but it is sufficient to reflect that refiners are doing everything possible to prevent surplus gasoline from being a burden on the open market." (Govt. Ex. 281, R. 2921.)

[12]Dyer, R. 1470.

[13]R. 2921.

[14]Def. Ex. 953, R. 3649. Even this was less than had been expected. The Bureau of Mines had estimated on the basis of past performance that consumption during this period would decline over 21%. *Ibid.*

C. The independent refiners were forced to sell their gasoline as fast as they refined it because, generally speaking, they had little or no storage capacity.

Major integrated refiners generally have considerable amounts of storage capacity which enable them to absorb any overproduction.[1] The independent refiners, however, are in an entirely different position. With few exceptions they have little or no storage capacity.

Franklin testified:

> "After the gasoline is manufactured by the refiner, as a general rule, in normal times, he puts it on the market. Each refining plant has a normal amount of storage facilities to maintain inventories necessary for working stocks. But it is the general rule among the so-called independent refiners not to have tankage for working stocks beyond a reasonable limit, and they do not usually have storage facilities beyond their necessary working stocks to take care of current business.
>
> "In times of overproduction, they are compelled to throw their product on the market at whatever price it will bring. That gasoline is called distress gasoline in the trade.
>
> "An independent refiner doesn't build sufficient storage tanks for his gasoline for several reasons. For one thing, it is very costly; and for another, when he puts it in storage he is gambling on the markets, more or less, as to whether it is going to

[1]Franklin, R. 928; Shatford, R. 1010. During the indictment period most of this storage capacity was empty. Inventories were "very low" in January, 1935. They were reduced below seasonal requirements in the Spring, and were not restored until February of 1936. (Shatford, R. 1010; Van Covern, R. 1512-4. Def. Ex. 953, R. 3649.)

go lower or higher. Most of them are not able to take those chances, beyond a certain limited amount of storage. It also ties up his capital, and he doesn't get any returns to pay for his runs of crude oil, and he has got to pay the producer for them every month. If he hasn't sufficient storage facilities, he sells the gasoline he produces from day to day at whatever price it will bring on the market (R. 929-30).

Shatford testified:

"The small refiner cannot hold his gasoline until it is possible for him to get a better price. He hasn't any or very much storage. If he built storage he would not have the money to meet his crude pay-day, that is, the day when he has to pay the producers for their oil. So, generally speaking, he has to sell his stuff as he makes it (R. 1003).

"Independents or non-integrated refiners do not have any substantial storage capacity. They do not have any appreciable refinery stocks of gasoline because they haven't even the storage in which to put it nor the money with which to pay for it as a general rule. There are exceptions" (R. 1010).

McDowell testified:

"Not very many independent refiners could store this gasoline until they could get a better price, because they had neither the storage nor the money to finance the storing of large quantities of gasoline. And you know, crude oil has to be paid for twice a month" (R. 1166).

Again, it will be noted that the testimony is not that no independent refiner had storage capacity, but that, *gen-*

erally speaking, independent refiners do not have any substantial storage capacity.

The Government's brief refers (B. 46, n. 59) to certain testimony of the witness Van Covern and to three exhibits which, it claims, show that "many independent refiners had substantial storage capacity which enabled them to keep gasoline off the market when they regarded this as economically desirable." Van Covern testified that "Any seasonal operator like [the respondent] Skelly or Kanotex * * * carried seasonal inventories".[5] The market letters contain the following remarks:

> "The Waggoner Refining Company (referred to in the last week's report) are cooperating with the 'buying group' in an orderly liquidation of their stocks. * * *"[6]
>
> "Simms Oil Company, who recently disposed of their marketing facilities and are now dismantling their Dallas refinery, originally had some 300 cars of gasoline in storage which they are anxious to dispose of. * * *"[7]
>
> "* * * We received an offer of 75,000 barrels of 66 plus octane from Refiners Export Corporation for lifting at Texas City at a price of 5½¢, which is ¼¢ above the 'current low'. We believe that this cargo is made available by the failure to consummate arrangements for the sale of this cargo on the Pacific Coast to be transported by the S. S. 'Brandywine'."[8]

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[5]Van Covern, R. 1535.
[6]Gov. Ex. 187, R. 2754.
[7]Gov. Ex. 190, R. 2764.
[8]Gov. Ex. 248, R. 2840.

It is significant that these letters refer to obvious exceptions to the rule. The Kanotex Refining Company operates the third largest independent refinery in the indictment territory.[9] Waggoner Refining Company, owned by the wealthy ranching family, has "substantially more storage than the ordinary independent refiner in North Texas."[10] Refiners Export Corporation is obviously not a refiner at all but a terminal export company engaged in the business of assembling cargoes for export.[11]

On February 28, 1935, it was estimated that twelve major companies alone held 93.7% of the gasoline in storage in Kansas and Oklahoma. There were three other large major companies operating in those states. The figures for those companies were not available.[12]

The independent refiner's lack of storage capacity becomes a serious disadvantage when, in order to maintain his crude oil connections or his customers (see Section 1, *supra*), he has to manufacture gasoline for which there is no demand. Having no place to store the gasoline, he has no alternative except to sell the gasoline immediately.

The result is that the gasoline is frequently placed in tank-cars as soon as it is refined,[13] or the refiner "has to move that gasoline within the next twenty-four or forty-eight hours to prevent a shut-down."[14]

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[9]Def. Exs. 939 and 941, R. 3611, 3617.

[10]Gray, R. 1809.

[11]The company is not even listed as a refiner by the U. S. Bureau of Mines. See Def. Exs. 939 and 941, R. 3611, 3629; see also Arnott, R. 1715-6.

[12]Def. Exs. 839, 841, 842; R. 3356, 3358, 3360. Cf. Shatford, R. 1032.

[13]Jacobi referred to distress gasoline as gasoline "in tanks or in cars on the track." R. 3723. Shatford also referred to distress gasoline as being "on the track." R. 1004.

[14]Cline, R. 639.

D. Gasoline was not considered distress gasoline unless the refiner was unable to find a customer for it except at a forced-sale price.

Generally speaking, the independent refiners, had no bulk storage plants or service stations through which they could market the gasoline themselves.[1] They did, however, have two types of customers: (1) jobbers who purchased under long-term supply contracts and (2) jobbers and brokers who purchased from time to time on the spot tank-car market.[2]

The record shows that gasoline was not considered distress gasoline unless both types of customers—not only the jobbers who purchased under contract, but all the jobbers and brokers who purchased regularly on the spot tank-car market—had been satisfied.

Jacobi testified:[3]

> "We differentiated distress gasoline from other gasoline by the statement of the refiners that it was distress gasoline *they couldn't move.*" (R. 384).
>
> "Q. What was the necessity of buying, or of finding markets for the distress gasoline? A. It was evident that *they couldn't find it themselves*" (R. 378).
>
> "In speaking of the recommendations of buying prices which I made between March 14 and June 1, 1935, I stated that I based my recommendations upon the fair prices for gasoline. Independent refiners in 1935 sold some of their products upon contract, and they disposed of some in spot transac-

[1]Beroth, R. 185; Franklin, R. 947; Shatford, R. 996.
[2]Franklin, R. 930; Jacobi, R. 493.
[3]All italics are supplied.

tions to their jobber outlets. They also sold some through brokers. Generally speaking, *what they couldn't dispose of in these channels was distress gasoline.*" (R. 493).

"In attempting to determine the amount of distress on the market at any time, our sub-committee considered that the movement of refiners' gasoline, other than that which might be purchased by majors, would proceed on a normal basis. We considered the normal outlets of the refiners in their sales to their contract people, we considered the ordinary sales they made to brokers, and sales made to jobbers in the spot market. *If they had no outlet for anything beyond those outlets, that would be distress gasoline.*

"I knew markets in the Mid-Continent area, not marketing, because I am not in the marketing end of the business. I had a good idea of what the outlets were of the independent refiners. I knew that they sold a large part of their output to jobbers." (R. 495-6).

Cline testified:

"We considered in the Association that 'surplus gasoline' was the amount of gasoline a refiner manufactured *over and above his fairly steady outlet to jobbers and brokers.*" (R. 636).

"The way we considered it, it was surplus gasoline that we were selling to these major companies through the Association, but I don't believe I have made clear what we consider to be a surplus gasoline. Here is a refiner that makes 5 cars of gasoline a day: that is 35 cars a week. He is selling a certain number to jobbers, possibly brokers, week after week, and has been for an extended period of time. He knows just about how much business

he will get from them each week. Suppose that totals 25 cars. Then there are 10 cars left over that he has *no immediate home for*. He could sell it in half a dozen places at a bargain price, at whatever he could get for it, or whatever the buyer he approached would pay." (R. 642).

Steiger testified:

"Our ideas of surplus gasoline was the gasoline that was left over after the refiner's contract customers had taken out their requirements, after his regular buyers in the open market had come in and taken theirs, and it was that gasoline left *after they had exerted all efforts to attempt to sell it.* That gasoline left over was distress." (R. 751).[4]

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[4]On pages 642-3 of the Record, Cline apparently testified that the distress gasoline marketed through the East Texas Refiners Association could have been sold on the spot market at non-distress prices. An examination of his entire testimony, however, reveals that he was referring to the possibility of sales to major companies. He said:

"I don't believe it is true that if the refiner started out to sell that gasoline to jobbers, and not through our Association, he usually would have to take a lower price for it. I believe he might have to take a little lower price if he sold to a broker.

"This surplus gasoline did actually move at a lower figure before we had our Association; but that was before the Connally Act or any Federal regulation down there, and we had all kinds of prices.

"Surplus gasoline is more gasoline than the refiners have a regular market for. That is the way I have explained that we used it in our Association.

"Q. All right. Now, when you have more gasoline than you have a regular market for, can you dictate the price to a person that is taking surplus gasoline?

"A. You certainly don't have to take any price that is offered to you.

Fisher testified, regarding the gasoline sold by the East Texas Refiners Marketing Association:

> "Each refiner was to sell his products to his own customers, and his surplus was to be turned over to the Central Selling Organization, and *he was to dispose of it through new customers, wherever he could find them.*" (R. 1119).

Under these circumstances, the only available purchasers for distress gasoline were those *who did not need the gasoline immediately.*[5] Since the refiners *did* have to

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"Q. You can store it if you want to; is that right?

"A. No. You can go out and build new markets, *just exactly what we did.*

"Q. You built new markets among the jobbers and brokers, did you?

"A. *There are other people that buy gasoline.*

"After the Connally Act was put into effect and our new Tender Board was set up, the refiners in the East Texas field were selling to practically every independent jobber and filling station owner in the eastern part of Texas. We wanted to find further markets in that territory; that is, the eastern part of Texas and the Texas Gulf Coast. *We had no one to turn to inasmuch as we were already supplying the independent trade except the major companies or the large companies* who were operating distribution plants and filling stations in the eastern part of Texas, and the people who were operating terminals on the Texas Gulf Coast. *That is what we did.*" (R. 641-2, italics supplied.)

[5] "When the market is pretty well saturated with gasoline, it won't absorb the surplus offers, and it is under those circumstances that distress gasoline gives the most trouble."

* * *

"By 'saturated' market I mean that the market has taken up all the gasoline that it wants, and is beginning to pick and choose on the basis, *not of need, but on the basis of price*" (Shatford, R. 1004.)

sell immediately, the purchasers naturally took advantage of the situation and forced the price down below the prices being paid by those who did need gasoline.

Prior to 1935 even major companies had used their superior bargaining positions in this way. Jacobi testified:

> "It had been the practice among buyers for major companies as well as others to take advantage of refiners who were in a distress position, and beat down those refiners in their prices. I had done it myself." (R. 477).

On this, all witnesses were agreed: the only price which the refiner could get for gasoline was *what a buyer who had no immediate need for the gasoline was willing to pay.*

> "• • • they have no market, except at distress prices." (Jacobi, R. 373).
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> • • •
>
> "• • • They would have to sell at any price they could get for it." (Jacobi, R. 385).
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> • • •
>
> "• • • he had to take the best price he could get for it. • • •" (Cline, R. 628).
>
> • • •
>
> "• • • He could sell it in half a dozen places at a bargain price, at whatever he could get for it, or whatever the buyer he approached would pay. • • •" (Cline, R. 642).
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> • • •
>
> "• • • they are compelled to throw their product on the market at whatever price it will bring. • • •" (Franklin, R. 929).
>
> • • •

"* * * They had to sell it some place. They sold it for a lower price than the market, in order to dump it. * * *" (McDowell, R. 1177).

* * *

See also: Bradshaw, R. 671; Steiger, R. 751-2; Shatford, R. 1002; Travis, R. 1129-30; Frey, R. 1327; Arnott, R. 1691-2; 1763-4.

E. The effects of distress gasoline.

Distress gasoline had three effects:

(1) It kept the tank car price of gasoline below parity with the price of crude oil and below the cost of manufacture;

(2) Because of the hardship which the low level of the tank-car market imposed upon the independent refiners, it was a constant threat to the crude oil price of $1.00 per barrel which the Administration was attempting to maintain; and

(3) It was a primary cause of retail price wars.

The first point—the effect of distress gasoline on the retail market is made clear by the testimony of the witness Shatford:

"* * * Distress gasoline depresses or reduces the general tank car price to the refiners.

"It is not necessary to have a large quantity of distress gasoline on the market to create this effect. In some circumstances a very small quantity of gasoline will do the trick." (R. 1003).

As Shatford explained, the depressing effect of gasoline might be intensified by the practice known as "pyramiding." He described this as follows:

"Assume that the market is just a little shaky, say in the fall of the year when everybody is looking for a drop in the consumptive demand and the movement slows up a little, and a refiner has 10 or 15 cars of gasoline on his track that he hasn't sold. He usually wires a broker or a jobber and offers him that 10 cars of gasoline. He probably wires 10 brokers. Then each of those brokers starts calling each other up trying to sell that same 10 cars to each other and starts calling up the jobbers. The first thing you know, it sounds like 100 cars of gasoline, and the market will be hurt." (R. 1003-4).

Witness Gray also testified to this effect, saying:

"* * * To sell 100 cars of gasoline a refiner may call 4 or 5 brokers and offer them 100 cars of gasoline. That 100 cars immediately becomes 1,000 cars of gasoline." (R. 1823).

Dr. Frey testified that it was his observation "as a member of the Petroleum Administrative Board that, the distress gasoline * * * was one of the obstacles which, in January and February, 1935, was preventing the price of gasoline from rising to parity with the price of $1.00 crude" (R. 1327).

[Many of the respondents' offers of proof also established that distress gasoline had a seriously depressing effect upon the price level. Thus, the National Petroleum Agency agreement[1] provided that:

"The purpose of this association is to purchase, hold and, in an orderly way, dispose of surplus gasoline which threatens the stability of the oil

[1]Def. Ex. 832, R. 3332, 3336.

price structure in an effort to bring the prices of gasoline into proper relationship with the present price of crude oil and to maintain and support such relationship. * * *"][2]

The effect of distress gasoline upon the crude oil price structure is best illustrated by what happened at the General Stabilization meeting of January 4, 1935, at which the tank-car stabilization committee was appointed. Distress gasoline was specifically mentioned as one of the principal factors which had contributed to the depressed condition of the independent refiners.[3] The reaction of the independent refiners to this situation is described in McDowell's testimony as follows:

"* * * Mr. Majewski said he wanted to speak for the group of 20 or 25 independent refiners that he and Mr. O'Shaughnessy had been representing in all stabilization efforts. He said that these refiners were going broke, and that something had to be done. He pointed out that they were having to pay $1.00 for crude, and that they were selling their gasoline way below cost. He stated that under the Code, there was a formula that involved the refining industry's getting 5½¢ for gasoline when crude was at $1.00 a barrel.

"Mr. Majewski said a lot of things, but I will just shorten it. He wound up by saying that unless something was done, this group of independent refiners was going to be forced to either close down and throw people out of work, or withdraw from

[2]See also Def. Exs. 831, 844, 845, 846, 847 and 848 for Identification, R. 3329, 3367-89; Shatford offer, R. 1045-52. See also the Blazer report (Def. Ex. 1029 for Identification), quoted at pages 282-4, *infra*.

[3]McDowell, R. 1168; Arnott, R. 1691-2.

Code activities so that they would no longer have to pay Code wages and adhere to Code hours. Furthermore, as a last resort, they would unite to try to cut the price of crude oil." (R. 1168-9—See also Arnott, R. 1693-4).

[It will be noted that in the National Petroleum Agency agreement quoted above, surplus gasoline is characterized as a threat to "the stability of the oil price structure".]

As to the effect of distress gasoline upon the retail market, Dr. Frey, the member of the Petroleum Administrative Board in charge of marketing, testified as follows:

"Q. What relation, if any, did the sale of gasoline at distress prices have to price wars?

"A. It encouraged the number of them, and intensified the price differentials" (R. 1328).

VIII.

The effect of the respondents' purchasing activities upon the "market supply" of gasoline.

A. Foreword.

This section is necessary because the Government's brief states that:

> "* * * The amounts to be purchased * * * constituted from one-third to one-half of the normal spot market sales of the Mid-Continent independent refiners named in the indictment and fr. . one-fifth to almost one-third of the normal spot market sales of all the substantial Mid-Continent independents * * *" (B. 47).

Elsewhere in its brief the Government states that the respondents "sharply curtailed market supply" (B. 80) and that there was an "elimination or sharp curtailment" of sales to jobbers and brokers purchasing on the spot market (B. 44).

The basis for these statements seems to be footnote 60 on page 47 of the Government's brief which reads as follows:

> "Defendants' Exhibit 1023 (R. 3803) shows the total gasoline sales (in gallons) of the Mid-Continent independent refiners named in the indictment and the amount of gasoline (in gallons) purchased from these refiners by the defendants, for the years 1935 and 1936. The exhibit gives the same data for 29 principal Mid-Continent independent refiners (including those named in the indictment). Since independent refiners sell only one-third to one-half of

their output on the spot market (R. 189), the extent to which defendants' purchases reduced normal spot market supply is shown by the tabulation below.

	Total sales	Normal spot market sales		Purchased by defendants	% of normal spot marked sales purchased by defendants	
		½ col. (1)	½ col. (1)		Based on col. (2)	Based on col. (3)
	(1)	(2)	(3)	(4)	(5)	(6)
Independent refiners named in indictment:						
1935	377,988,736	125,996,245	188,994,368	64,440,712	51	34
1936	416,923,200	138,974,400	208,461,600	80,234,958	57	38
39 leading independent refiners:						
1935	903,296,529	301,098,843	451,648,264	93,394,727	31	20
1936	1,004,006,200	334,668,733	502,003,100	109,378,261	32	21

B. There is no allegation in the indictment and no proof in the record as to the extent to which the respondents' purchases had affected the supply of gasoline on the Mid-Continent spot tank-car market.

The only allegations in the indictment as to the extent of the respondents' purchasing activities are contained in the following portions of paragraphs 21 and 23:

> "* * * Said quantities of gasoline purchased from said independent refiners through said East Texas Refiners Marketing Association have amounted to more than 50% of all the gasoline produced by said independent refiners" (R. 14).
>
> "* * * Said quantities of gasoline purchased from said independent refiners in said [Mid-Continent] buying program have amounted to nearly 50% of all the gasoline sold by said independent refiners" (R. 16).

The Government introduced no proof in support of these allegations. As shown in sections IV and V, the

respondents affirmatively disproved them. Undisputed evidence introduced by them showed that the respondents, together with the defendants which were dismissed because they had been dissolved or reorganized, had purchased only 14.9% of the gasoline sold by the Mid-Continent refiners and only 14.07% of the gasoline produced by the East Texas refiners named in the indictment.[1]

The respondents also introduced evidence which showed that their purchases amounted to a still smaller percentage of the production of other Mid-Continent and East Texas refiners.[2]

In their closing addresses to the jury Government counsel conceded that these allegations of the indictment were a "mistake",[3] and characterized as a "red herring" the respondents' evidence disproving this charge.[4] They then suggested for the first time that independent refiners "produce a great deal more than they sell on the spot market" and that if an investigation were made into the amounts which the independent refiners sold *on the spot market*. (as opposed to their total production and sales) it would be found that the respondents had purchased a large percentage of that amount (R. 2077). The table on page 48 of the Government's brief is apparently intended to support this charge which was made for the first time, in the closing addresses of the Government counsel.

In point of fact the record contains no evidence as to the amount of gasoline which the independent refiners in the Mid-Continent sold on the spot market. The witness

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[1] See pp. 135-6, 174-6, *supra*.
[2] *Ibid*.
[3] R. 2077.
[4] R. 2080.

Beroth (upon whose testimony the table in the Government's brief is based) did not testify, as stated by the Government, that the independent refiners sell "one-third to one-half of their output on the spot market". He testified as follows:

> "* * * Of the 15% of all the gasoline that is handled and sold in the Standard of Indiana territory, which I say is refined by the independent refiners, about 7½%, possibly or maybe 10% I would say is sold by the independent refiners under written or printed contracts with the jobbers. That would leave either 7½% or 5% which is sold in some other way by these independent refiners. Normally, that 5 or 7½% is sold in what is known as day to day sales or separate transactions to the jobbers or concerns like ourselves who inquire for prices" (R. 189).[5]

This testimony, however, does not purport to show the total amount of gasoline sold on the Mid-Continent spot market. It shows only the total amount of gasoline *sold in the Mid-Western area* which is purchased on the spot market. In point of fact the Mid-Continent spot market supplies not only the Mid-Western area, but other natural markets, such as the oil-producing states themselves, the Rocky Mountain states, the southeastern states, Nebraska, Arkansas, etc.[6]

The total amount of gasoline sold on the Mid-Continent spot market area must, therefore, have been *considerably greater* than the amount of the spot market gasoline which was sold in the Mid-Western area.

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[5]Another Government witness testified as a "rough guess" that 5 to 10% of the gasoline, "sold and marketed" in the Mid-Western area came from the spot market. (R. 798.) This testimony is not relied upon by the Government.

[6]See Bosworth, R. 847, Govt. Ex. 120, R. 2716.

C. Even if the testimony relied on by the Government had purported to show the extent to which the respondents' purchases had affected the supply of gasoline on the Mid-Continent spot tank-car market, the actual percentages of the supply purchased by the respondents would be only 14.9 to 22.7%.

As we have just seen, the table on page 48 of the Government's brief is based entirely on the mistaken assumption that the witness Beroth was testifying, about the total amount of sales on the spot market, instead of about the percentage of gasoline *destined for the Mid-Western area* which was sold on the spot market.

In so far, however, as the table purports to reflect the effect of the respondents' purchases on the amount of gasoline available on the Mid-Continent spot tank-car market, it is grossly misleading in three additional respects.

(1) Half the figures used by the Government are for the year 1936. The Mid-Continent Buying Program was in operation only during the first four months of that year. The respondents' purchases during the last eight months of 1936 ran *27% higher* than they had under the buying program.[1]

(2) Even the Government's figures as to the amount of gasoline purchased by the respondents in 1935 includes some 8,670,000 gallons which were purchased from the 14 refiners named in the indictment and some 8,710,000 gallons which were purchased from "29 leading independent refiners" by Standard of Indiana, Barnsdall and Globe of

[1] J. D. Miller, R. 1641.

Kansas, *which are not respondents in this case.*[2] Standard of Indiana and Barnsdall were granted new trials, and Globe was dismissed from the case after verdict.[3]

(3) The 14 independent refiners named in the indictment and the "29 leading independent refiners" were not the only independent refiners doing business in the Mid-Continent field. In point of fact, the former group owned *only 32.2% of the operating refining capacity of the field.* The latter group represented *only 78.3%.*[4]

Limiting ourselves to 1935 (the only relevant period) and making the necessary corrections in the Government's figures we get the following results.

(1) If refiners selling 377,988,736 gallons of gasoline owned 32.2% of the operating refining capacity of the Mid-Continent field, and refiners selling 903,296,529 gallons owned only 78.3%, the total production of the independent refiners in the Mid-Continent field must have been in the neighborhood of 1,153,635,413 gallons.

(2) *Even if*, therefore, the independent refiners had sold from one-third to one-half of their production on the spot tank-car market, the total amount sold on that market would have been from 384,545,104 to 576,817,706 gallons.

(3) If Standard of Indiana, Barnsdall and Globe of Kansas bought 8,710,000 of the 93,394,727 gallons purchased in 1935, the respondents' purchases must have been 84,684,727 gallons.[5]

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[2]Def. Ex. 984, R. 3723; Evans, R. 523-5; Def. Exs. 1000, 1002, R. 3762, 3767.

[3]R. 2490-1.

[4]Def. Ex. 939 and 941, R. 3611.

[5]It might be objected that this figure is misleading because it is confined to purchases from only 29 refiners. However, it is

(4) On this basis the respondents purchases could have amounted to from 14.9 to 22.7% of the gasoline sold on the spot tank-car market.

D. The respondents purchased only 12.03% of the gasoline sold on the East Texas spot tank-car market.

It should also be noted that the Government does not purport to show how much of the total supply of gasoline in East Texas was sold on the spot market. The record on this point, however, is undisputed. The manager of the East Texas Refiners Marketing Association testified that:

> "Through the period 1935 and 1936, the independent refiners in East Texas marketed their gasoline practically altogether on the spot market. By 'spot market' I mean day to day transactions" (R. 624).

It follows from this that the percentage of the total spot market supply purchased by the respondents in East Texas was the same as the percentage of the total production of the independent refiners, viz. 12.03%.[1]

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fair to assume that the figures for all independent refiners would be about the same. The Government's own figures showed that the respondents, excluding Sinclair, purchased 54,240,000 gallons of gasoline in the entire Mid-Continent field during the fourteen months from March, 1935 through April, 1936. This would indicate purchases by those respondents during a twelve months period of approximately 46,491,000 gallons (Govt. Ex. 747, R. 3270). The Government submitted no figures for Sinclair, but figures introduced by the respondents indicate that Sinclair purchased 41,965,244 gallons of gasoline from all of the refiners in the Mid-Continent field (Def. Ex. 1015, R. 3797).

[1]See p. 176, *supra*.

E. The respondents purchased nothing but distress gasoline. There is no evidence that they prevented either brokers or jobbers from obtaining supplies.

As shown above the respondents purchased only distress or surplus gasoline. From the description of that gasoline, its causes and effects in the last section, it is apparent that it was gasoline for which there was no customers except at forced sale or distress prices.[2]

The passages in the various market letters which described the respondents' activities fully, confirm the fact that the respondents purchased only surplus or distress gasoline. Almost invariably they refer to the gasoline purchased as "surplus gasoline", "surplus material", gasoline "offered in excess of jobbers' requirements", etc.[3]

The Government's brief (B. 44, n. 56) refers to three letters (Government's Exhibits 256, 274 and 275), as supporting the conclusion that "brokers and other jobbers in the East Texas spot market found it practically impossible to obtain supplies in that market." The three exhibits mentioned are market letters from J. B. Warner of Tide Water to J. D. Collins of that company, dated May 11, October 26, and November 2, 1935. The pertinent passages thereof read, respectively, as follows:

> "In checking with marketers today we find that they are unable to buy gasoline in large quantities from any one district * * * Consequently brokers are placing the major portion of their purchases in Northern Texas and Oklahoma for northern shipment."
>
> * * *

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[2]See pp. 192-215, *supra*.

[3]Govt. Exs. 118, 188, 193, 198, 203, 260, 281, R. 2716, 2757, 2774, 2782, 2798, 2870, 2921.

"• • • East Texas has been moving practically no gasoline north as brokers say that they have been unable to find material in that district, and consequently have been placing their orders in North Texas and Oklahoma."

• • •

"Inter-refinery buying is still a major factor in the East Texas market, most of the material being purchased for Gulf Coast movement, leaving only small quantities available to northern buyers. Consequently, brokers are now purchasing a large portion of their requirements for northern shipment in North Texas and Oklahoma fields."

It will be noted that these three letters refer to two widely separate occasions; that on both of those occasions brokers were attempting to purchase "large quantities" for shipment to the Mid-Continent; and that on both occasions the letters state that the brokers were able to obtain material in the North Texas and Oklahoma (*i.e.*, Mid-Continent) fields.

The same footnote in the Government's brief relies upon the testimony of Carl Beroth. Beroth claimed that, by reason of inter-refinery buying, various East Texas refiners had been unable to fill his orders during 1935 and 1936. McMurray Refining Company sold him small lots, but could not fill an order for 25 cars; East Texas Refining Company and Cascade Refining Company sold him none at all; Grogan Oil Company was unable to fill his orders on four or five occasions in both 1935 and 1936; Trinity Refining Company sold only a few cars; Southport Petroleum Company could sell him none at all; Century Refining Company and Tyreco Refining Company could sell him very

little; Ocean Refining Company sold him only a few cars; Gilliland Refining Company sold him not over ten cars at a time.[4]

From other evidence, however, it appeared that the facts as to the availability of the East Texas refiners as sources of supply for brokers were as follows:

The respondents' auditors examined the refinery figures and audited the sales records of certain of the refiners mentioned by Beroth, to wit: East Texas, McMurray, Cascade, Grogan, Trinity and Ocean.[5] This audit revealed that during 1935 East Texas, McMurray and Grogan alone had sold 25,055,629 gallons to at least fifty different brokers. This figure exceeded major company purchases from these companies by eleven and a half million gallons. 770,880 gallons of this had gone to Beroth's own company.[6]

The amount of gasoline sold to brokers by Cascade and Ocean was not available. Since Cascade had a refinery capacity of 2,000 barrels a day, and sold only 55 tank-cars to major companies in 1935, those sales amounted, assuming an average operating rate, to only about 7.7% of the company's potential production. Ocean had a capacity of 3,000 barrels a day and sold 30 cars to the defendants during the entire year 1935. Such purchases amounted, therefore, to only 2.8% of the company's potential production. Trinity, which, according to Beroth, could make only a few cars available to him on account of major

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[4]Beroth, R. 197-9.

[5]J. D. Miller, R. 1637, 1639. It was impossible to audit the records of most of the other East Texas refiners because most of them had gone out of business. (J. D. Miller, R. 1653.)

[6]J. D. Miller, R. 1638-9.

company purchasing, did not sell a single car to any of the defendants. McMurray sold 1,736,548 gallons to brokers during 1935 as against 746,332 gallons to major companies. Grogan disposed of almost twelve and a quarter million gallons to brokers in 1935, over two million three hundred thousand more than it sold to major companies. East Texas Refining Company, from which Beroth claimed that he could get no gasoline at all, by reason of the respondents' purchases, sold 11,097,761 gallons to brokers in the calendar year 1935 alone. It sold only about a quarter of that amount to major companies during the same period.[7]

Cline, the secretary of the East Texas Refiners' Marketing Association, testified that substantially all of the gasoline sold through the Association was surplus or distress gasoline for which the refiners had no regular market anyway.[8] The East Texas refiners always saved enough gasoline for their regular trade and there was never a day when northern jobbers could not obtain gasoline in East Texas.[9] As noted above, the record shows that the respondents purchased only 14.07% of the gasoline sold on the East Texas spot market.[10]

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[7]J. D. Miller, R. 1638, 1639.

[8]Cline, R. 642, 644-5. This testimony was confirmed by the testimony of Fischer and Travis as to the reasons for forming the Association. Fischer, R. 1119; Travis, cross, R. 1129-30.

[9]Cline, R. 644-5.

[10]See pp. 174-6, *supra*. Beroth attempted to give similar testimony regarding attempts to purchase gasoline in the Mid-Continent. (Beroth, R. 197, 200-2, 204). This testimony was answered in similar fashion (Gray, R. 1817-8; J. D. Miller, R 1639).

F. Most, if not all, of the gasoline which the respondents bought in 1935 and 1936 was gasoline which they were compelled to buy and which they would have bought, regardless of the existence of a buying program.

1. *Generally.*

Since there *was* a buying program, it is naturally impossible to determine whether or not the respondents would have purchased as much gasoline as they did if there had never been a buying program. There *is* evidence that, in the absence of a program, they would not have made so many purchases *from the independent refiners having distress gasoline.* That is to say, the respondents bought more heavily from such independent refiners under the program instead of confining their necessary purchases to other large refiners.

McDowell testified that one of the original objects of the plan was to divert major company purchases from large refiners who had no distress gasoline on hand to small independent refiners who did have. He said:

> "* * * Mr. Ashton said that the plan he would suggest was quite a simple one. He pointed out again that this survey showed about 600 or 700 cars of distress gasoline in the hands of some 15 or 17 independent refiners; on the other hand, there were some 10 or 12 major companies who were known to be regular and normal buyers of gasoline. He thought that if this information of the availability of distress gasoline could be put in the hands of these major companies on an intelligent basis, that it would be a helpful thing for this Committee to do."[1]
>
> * * * *

[1]McDowell, R. 1182.

"* * * Mr. Ashton stated that he felt the manner in which this previous buying [by major companies] had been done was responsible for the failure to accomplish anything. He stated that in the first place he had observed that the major companies followed the line of least resistance in their purchasing, and bought from those companies that they were well acquainted with, with the better known and larger of the independent refiners. In many instances, this had resulted in giving those refiners more business than they really needed, so that they had been over-running their federal allocations; and, on the other hand, this had left some of the smaller and lesser known independent refiners with distress gasoline to sell."[2]

* * * *

"* * * I said that we discussed at that meeting the fact that we felt there were some 10 or 12 companies who were regular and normal purchasers of gasoline, and that this Committee might attempt to put these purchasers in touch with the sellers, for the purpose of giving these independent refiners an outlet that already existed for their distress gasoline. These major companies were buying gasoline and had to buy gasoline, and, as I tried to explain, they had been buying it from just a few companies. Our plan contemplated trying to get them acquainted with some of the smaller and lesser known independent refiners."[3]

In his memorandum of the February 11th meeting,[4] Mr. Sus stated that the program involved 14 major com-

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[2]McDowell, R. 1182-3.
[3]McDowell, R. 1218.
[4]Govt. Ex. 376, R. 2977.

panies, each selecting one or more small refining companies whose gasoline it could advantageously move, and obligating itself to take whatever surplus or distress gasoline such company might have. Mr. Sus' memorandum states that the major companies indicated a willingness to make such selection and to "assume responsibility" for such surplus or distress gasoline.

Sus also testified in this case. He said:

> "Q. On the subject of what the major company could advantageously move, you meant, of course, gasoline which they could use. You didn't intend that anybody would buy gasoline that they would have to dump overboard, did you? A. No, sir.
>
> "Q. But you didn't mean to say that they buy only that gasoline which they would have bought otherwise, or would have bought anyway, did you? A. Yes, yes sir, I did. I meant to say that they were going to buy only gasoline which they normally would have needed and they would have bought regardless of any program."[5]
>
> • • • • •
>
> "Q. If they were only going to buy what they needed, that wouldn't have been any burden, no matter how much it was, would it? A. No.
>
> "Q. No. So, if your discussion was that they would each buy only what they were going to need, you wouldn't have talked about a burden at all? A. It would have been a burden to dislocate their present buying routine and direct it into other channels.
>
> "Q. It would have been a burden if they were going to have to do something that they weren't normally doing? A. That is right."[6]

[5]Sus, redirect, R. 1871.

[6]Sus, redirect, R. 1873.

Occasionally the purchasing companies cancelled existing purchase or "exchange" arrangements in order to use their "dancing partners'" gasoline. In March, 1935, an employee of Philips recommended to his company that it switch some of its purchases of gasoline from another major company, the former defendant Barnsdall, to the distress gasoline of small refiners. His inter-office memorandum stated that such buying would be in line with the program to support the market.[7] One of the divisions of Socony-Vacuum also cancelled an exchange arrangement with another major company because it wanted to be able to take distress gasoline from small refiners.[8]

Jacobi, the buyer for Socony-Vacuum, testified that one factor which influenced him in making purchases was the desire "to do his part" under the buying program.[9]

The purchasing of distress gasoline sometimes was a hardship on Skelly, one of the smaller major companies. For example, on January 9, 1936, W. T. Atkins of Skelly wrote two letters as follows:[10]

> "Dear Mr. Kaye:
>
> "Up to the present time there has been no change in the status of our gasoline purchasing during the last few months which is only for the account of absorption of excess stocks in our immediate territory. We are buying none for our own requirements on account of freight rates or prices with the exception of probably a few points into Oklahoma.

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[7]Govt. Ex. 489, R. 2999.
[8]Govt. Ex. 334, R. 2964.
[9]Jacobi, R. 436.
[10]Govt. Exs. 95 and 96; R. 2699.

"On the present program, we are obligated for about 50 or 60 cars a month of outside material, largely third grade which is rather burdensome at this season of the year when our sales of third grade are the lowest."

• • • •

"Dear Mr. Nagle:

"I wish to acknowledge your letter on obligations in the buying program of 10 cars 70 Octane and 55 cars of U. S. Motor. I trust that you will be able to use some of this U. S. Motor in Oklahoma, even at points where you are buying or exchanging gasoline. It may be that we will have to eliminate some exchanges inasmuch as our sales of third grade gasoline at this season of the year are so low that we cannot move anything like this volume of this product to our own stations.

"In some instances we may have to start with a small amount of freight differentials, temporarily at least until the consumption of third grade gasoline shows a higher rate of consumption as that is about the only way we can relieve the situation since our third grade gasoline sales only amount to 9% of our retail business."

Even these letters, however, indicate that Skelly was already obtaining gasoline from other outside sources.

2. *The respondents had always purchased substantial amounts of gasoline from independent refiners since their production was not sufficient to take care of their sales.*

It was shown without dispute that the respondents have been purchasing substantial quantities of gasoline

for many years. While the present major companies have been expanding and integrating their operations, the demand for gasoline has increased so rapidly that their refinery capacity has frequently been insufficient to supply the needs of their own outlets. As a result they have had to purchase—usually from the non-integrated refiners who had no outlets of their own.[14]

Most of the respondents have been purchasing in substantial quantities in every year since 1931. The following table shows the purchases which four of them have made during these years.

(All figures approximate and in thousands of gallons)

Year	Pure[15]	Sinclair[16]	Skelly[17]	Globe[18]
1931	8,522	75,381	6,816	unavailable
1932	12,362	72,848	unavailable	unavailable
1933	31,984	6,778	9,241	2,457
1934	22,044	80,951	10,658	2,483
1935	29,246	86,116	17,300	2,630
1936	40,125	114,189	16,441	2,961
1937 (1st 6 mos.)	16,829	unavailable	unavailable	2,000

The record also shows that Socony-Vacuum had been buying for years[19]—in fact, Jacobi's job was buying gasoline,[20] that Continental had bought an average of 54,600,000 gallons a year since 1929,[21] and that Phillips had bought consistently since 1931.[22]

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[14]Shatford, R. 999.
[15]Def. Exs. 739, R. 3226; R. 3401; 854, R. 3405.
[16]Def. Exs. 878, R. 3463; 879, R. 3465; Everett, R. 1157-60.
[17]Hopp, cross, R. 852-3.
[18]Def. Ex. 999, R. 3757.
[19]Jacobi, R. 356, 461.
[20]Jacobi, R. 356.
[21]Bosworth, cross, R. 848.
[22]Kelly, cross, R. 840.

It will be noted that Pure, Sinclair and Skelly bought more in 1936 when the buying program was operating only four months than they did in 1935 when it was operating ten months; that Globe purchased almost as much during the first six months of 1937 as it had during 1935, and that Pure purchased more heavily during this period than in 1935.

It also appeared that Continental had purchased more heavily in 1934 than in 1935,[23] and that Sinclair had purchased more heavily in January and February, 1935, than it had during the buying program.[24]

The respondents as a whole purchased 27% more gasoline in the eight months following the abandonment of the buying program than they did during the fourteen months of the buying program.[24a]

The respondents also adduced the following evidence, showing the needs of the respondents during the indictment period.

Socony-Vacuum—Wadhams.

Jacobi testified that he had two reasons for buying: he wanted Socony-Vacuum to do its part in the program, and he needed the gasoline.[25] In one of his letters he had noted that Socony's purchases had enabled it "to do its part on the inter-refinery buying."[26] He had, however, been buying for years. That was his job—buy-

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[23]Bosworth, cross, R. 848.
[24]J. D. Miller, R. 1635.
[24a]J. D. Miller, R. 1641.
[25]Jacobi, R. 436.
[26]Govt. Ex. 87, R. 2695.

ing gasoline and other petroleum products for Socony Vacuum.[27]

Jacobi kept in constant touch with Ashton and the various Socony-Vacuum offices, and knew what they would need from month to month.[28] From March to November, 1935, for instance, Wadhams' cracking units at East Chicago were shut down for repairs. Instead of running at its capacity of five or six thousand barrels of crude oil a day, the refinery could process only two thousand a day.[29] Since this refinery supplied a good part of the requirements of the Chicago Division, the shut-down necessitated the purchase of additional amounts of gasoline for both companies.[30] Later in the year, the Socony-Vacuum refinery at Augusta, Kansas, fell behind, being unable to satisfy the demand of the various divisions which it supplied, and gasoline had to be purchased to offset this deficiency.[31]

Continental.

Continental had always been chronically short of gasoline, there never having been a year when its production had equalled its sales. The company had been forced to purchase substantial amounts of gasoline in each year since 1929.[32]

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[27] Jacobi, R. 356, 461. During the operation of the program Jacobi sometimes "stimulated orders" from various division offices. This, however, consisted merely of calling the offices and asking them if they had instructions which he could give to some independent refiner who had distress gasoline to dispose of. (Jacobi, R. 436-7).

[28] Jacobi, R. 435.

[29] Jacobi, cross, R. 491.

[30] *Ibid.*

[31] Jacobi, R. 435.

[32] Bosworth, cross, R. 848.

Pure.

Throughout the Code period, Pure was refining as much gasoline as the authorities would allow. After the *Schechter* decision it stepped up its runs and operated at full capacity throughout the rest of 1935 and throughout 1936.[33] Even if it had operated its refineries for the sole purpose of producing gasoline and had paid no attention to other petroleum products, it could not have produced enough gasoline of the quality necessary to satisfy its demands.[34] In December, 1934, and January and February, 1935, it was forced to engage Gulf, Standard of Louisiana, and Standard of Ohio to process gasoline for it.[35] The following table[36] shows the amounts of gasoline manufactured, bought, and sold by Pure, and processed for Pure from January, 1931, and through June, 1937.[37]

(All figures approximate and in thousands of gallons)

Year	Sales	Manufactured	Purchased from independent refiners	Purchased elsewhere	Processed
1931	493,745	485,655	320	8,202	None
1932	502,331	498,292	450	11,922	None
1933	489,673	483,983	647	31,337	None
1934	520,294	463,282	3,620	18,424	None
1935	587,971	527,057	10,340	18,906	59,638
1936	662,090	530,688	16,920	23,205	79,051
1937 (1st six months)	332,008	293,514	16,829	12,602	45,028

In spite of efforts to build up substantial inventories during the winter months, Pure's inventories had declined

[33] Langfitt, R. 1145.
[34] Langfitt, R. 1145, cross, R. 1146.
[35] Langfitt, R. 1146.
[36] Made up from Def. Ex. 739, R. 3226.
[37] Wescoat, cross, R. 856-8; R. 1133, 1134-7.

in the winter of 1934-5.[38] Until November, 1935, it had less than twenty days' supply of gasoline on hand. In the spring of 1935 it had less than two weeks' supply.[39] Neither the allowable crude oil at its disposal[40] nor its refining equipment[41] was sufficient to satisfy its demand. Not only did it have to buy finished gasoline, but it had to purchase large quantities of crude oil and have it processed by other refiners.[42]

Shell.

The record contains no evidence as to Shell except the fact that the Shell Pipe Line bought 201,394 gallons of gasoline from the Cushing Refining and Gasoline Company in April, 1934.[43]

Sinclair.

Sinclair's operating figures showed that during the indictment period, and for several years past, it had been faced with a steadily rising demand which its own refineries were quite unable to satisfy. The following table[43a] shows for each year from 1931 through 1936, the company's requirements,[44] the amount it manufactured, and the

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[38]Wescoat, cross, R. 860.

[39]Def. Exs. 740, R. 3223; 740-A, R. 3235; 741-A, R. 3263; 855, R. 3409; 859, R. 3425. Wescoat, cross, R. 859; direct, R. 1137-40.

[40]Def. Exs. 852, R. 3400; Wescoat, R. 1133-4.

[41]Wescoat, R. 1134.

[42]Wescoat, R. 1133-4.

[43]Def. Ex. 888, R. 3476.

[43a]Made up from Def. Exs. 878, R. 3463; 879, R. 3465; and from Everett's testimony, at R. 1158-60.

[44]The company's "requirements" consist principally of its sales, but also include the amount of gasoline used by the company itself (Everett, R. 1157, 1160).

amount it purchased, with figures showing the relative proportions of the latter to the total requirements.

(All figures approximate and in thousands of gallons)

Year	Requirements	Manufactured	% of Requirements	Purchases	% of Requirements
1931	907,002	848,893	93.59	75,381	8.31
1932	880,243	818,883	93.03	72,848	8.28
1933	964,902	924,396	95.80	66,778	6.92
1934	1,041,334	928,437	89.18	80,951	7.77
1935	1,166,032	1,093,275	93.76	86,116	7.39
1936	1,292,169	1,119,543	92.83	114,189	8.84

Mid-Continent.

McDowell testified that Mid-Continent bought only such gasoline as it needed, and that it would have bought the same amount whether there had been a Tank-Car Stabilization Committee or not. Throughout the indictment period Mid-Continent's sales ran greatly in excess of its capacity to produce.[45]

Phillips.

Phillips had increased its sales each year it had been in business, including 1935 and 1936. In 1934 the increase had been over 5%; in 1935 9.3%; and in 1936 4.4%.[46] Its refineries had always operated continuously at their full capacity,[47] and during 1935 and 1936 they had operated in excess of their safe, normal capacity.[48] The company had been buying regularly since 1931.[49]

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[45] McDowell, R. 1215.
[46] Kelly, cross, R. 841; recross, R. 842.
[47] Kelly, cross, R. 841; redirect, R. 841.
[48] *Ibid.*
[49] Kelly, cross, R. 840.

Skelly.

The facts showed that Skelly's production had fallen short of its sales ever since 1931, and that during 1935 and 1936 its purchases had barely made up the deficiency. The following table shows the deficiency of its production under sales and the amount of its purchases for the years 1931 and 1933-36[50] (In barrels.)

Year	Deficiency	Purchases
1931	65,526	162,288
1933	55,275	220,035
1934	338,415	253,766
1935	409,393	411,910
1936	387,425	391,457

Globe.

The manufacturing, inventory, purchase and sales figures for the Globe companies show that their purchases have corresponded exactly to their manufacturing deficiencies ever since 1931.[51] The only substantial purchasing which the Oklahoma Company did during the indictment period was between February and June, 1935, when the Blackwell refinery was shut down, and inventories were practically zero.[52] The only substantial purchasing by the Illinois Company was during May, June, July and November and December, 1935. Both periods were characterized by extremely low inventories and extremely high demand.

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[50]Ho, p. cross, R. 852.

[51]Def. ex. 1000, R. 3762; J. D. Miller, R. 1619-21.

[52]J. D. Miller, R. 1612-13.

Empire.

Empire's refinery at Gainesville, Texas represented approximately one-fifth of its available refinery capacity in the territory surrounding the Mid-Western area.[53] Prior to January 1, 1935, this refinery was shut down permanently.[54] At the time of the shut-down and some time before the buying program started, Empire began to negotiate with the Olney Oil and Refining Company, an independent refiner, with the idea of having Olney supply its needs for gasoline. Olney was selected because its location made it especially desirable to Empire from a freight standpoint.[55] When the buying program started, Empire merely carried out its plan by selecting Olney as its "dancing partner."[56]

Former Defendants.

The evidence as to the defendants who were dismissed or granted new trials was of a similar nature. Standard of Indiana had purchased more in 1934 than it had in 1935,[57] and its inventories were seriously depleted throughout the indictment period.[58] Barnsdall had purchased over five million gallons of gasoline in 1931 and 1932, over seven million in 1933, over nine million in 1934, and over twelve million in 1937 (as opposed to eight million in 1935 and ten million in 1936).[59] It was

[53]Def. Exs. 939, 941, R. 3611-13.
[54]*Ibid.* Jacobi, cross, R. 491.
[55]McDowell, R. 1196-7.
[56]Jacobi, R. 439.
[57]Barkdull, cross, R. 871.
[58]Barkdull, cross, R. 874.
[59]Evans, R. 552.

cheaper for it to buy gasoline than to make it because it had too much business for two of its refineries, and not enough to operate all three economically.[60] Globe of Kansas purchased more heavily both before and after the indictment period than during it. During the period, it had purchased only in April, May, July, August and October, 1935, when its inventories were falling rapidly.[61] The eastern Tide Water companies which used the gasoline bought by Tide Water Oil was operating its refinery at capacity throughout the indictment period, and yet fell far short of satisfying its needs from its own manufacture.[62] City Service Export bought in January, 1935, before the East Texas Association was formed,[63] as well as in February and March.[64] It needed gasoline very badly to make up its export cargoes.[65]

3. *Depleted inventories resulting from the administration of the refinery control provisions of the Code forced increased purchases.*

As noted above,[66] the system of refinery control had been administered since April, 1934, with the express purpose of depleting the major companies' inventories so that they would be forced to go out into the market and purchase from independent refiners. This purpose had, in fact, been accomplished, and by the end of 1934 the

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[60]Evans, R. 508, 542.
[61]Def. Ex. 1000, R. 3762.
[62]Parsons, cross, 812.
[63]Cline, R. 664.
[64]Travis, R. 1132.
[65]Buckley, R. 604.
[66]See pp. 45-9, *supra*.

majors' inventories were very seriously depleted, and many of them were being forced to purchase gasoline.[67]

In March, 1935, the National Coordinator's office, with the approval of Secretary Ickes, requested the major companies to curtail their manufacture of gasoline during March by some 1,400,000 barrels. In response to this request the major companies voluntarily curtailed their manufacture by some 960,000 barrels.[68]

4. *Record-breaking demand forced purchases.*

During March, April and May, 1935, the demand for gasoline exceeded the Government's estimates by 3,700,000 barrels. During each of these months the refinery allocations under the Code were based on the Government's estimates, and the major companies were forbidden to manufacture more than their allocations. As a result, the industry was "caught short", not only by the 960,000 barrels by which the majors had curtailed their operations during March, but by the 3,700,000 barrels by which demand had exceeded the estimates; a total of 4,660,000 barrels. By the end of May the majors alone were short by about 3,000,000 barrels or 15,000 tank cars.[69]

Demand continued to outrun expectations, and to break all previous records. In June, it was 6.8% higher than in June, 1934; in July 12.7% higher than in July, 1934; in August, 10.6% higher than the corresponding period of the previous year; in September, 11.7% higher

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[67]Shatford, R. 1010, 1011, 1013.

[68]Shatford, R. 1011, 1026-7, 1028-9, 1034-5; Def. Ex. 842, R. 3360.

[69]Shatford, R. 1065-8.

and in October, 10.6% higher. In November, it was slightly lower than 1934 consumption, but in December it was 14.7% higher than the corresponding period in 1934. During this entire period, with the exception of the month of September, the United States Bureau of Mines' forecasts of market demand, which were circulated in the industry, consistently under-estimated this demand.[70]

In 1936 consumption increased even more sharply, the average for the entire year being 9.5% higher than the record breaking year of 1935. In January of 1936, the increase over January, 1935, was more than 15%.[71]

As shown above, most of the respondents were operating their plants at capacity during this period, and were still unable to satisfy the increased demand of their customers.[72]

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[70]Def. Ex. 953, R. 3649.

[71]*Ibid.*

[72]See pp. 233-9, *supra.*

IX.

The reasons for the final achievement of parity in 1935.

A. Generally.

As we have shown, the price of gasoline began to rise on March 2, 1935.[1] By June, the price of third grade gasoline had risen from its low in February of 3¼¢ a gallon to 4¾¢, approximately in parity with crude oil selling at $1.00 per barrel.[2] Thereafter the price levelled off until January, when there was a rise in the price of crude oil and a corresponding rise in the price of gasoline.[3] The price again levelled off approximately at parity, with some fluctuations, in February and March, at no time going above parity.[4]

The Secretary of the Interior summarized the manner in which this parity was achieved in his Annual Report to the President, submitted to Congress in December, 1935,[5] as follows:

> "The operations of the Tender Board, of the production provisions of the code and refinery amendment, and of the stabilization committee of the planning and coordination committee with the cooperation of the Petroleum Administrative Board, brought the desired parity between the wholesale price of gasoline and crude oil in the spring of 1935 * * *."

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[1]See p. 105, *supra*.
[2]Def. Ex. 1024, R. 3807.
[3]Def. Ex. 713, R. 3177; Jacobi, cross, R. 487-8.
[4]Def. Ex. 713, R. 3177.
[5]Def. Ex. 917, R. 3522, 3525.

Many witnesses, both for the Government and for the respondents, agreed with the Secretary of the Interior that major company buying had had its effect on the price of gasoline in 1935 and 1936.[6] As Shatford said:

> "* * * a buying program would be an element of demand. * * * It was part of demand. I can't assess the relative value of that particular demand as against the demand as a whole * * *."[7]

A number of the respondents and their agents had also written letters showing that they believed that major company buying, either generally throughout the year, or in specific instances, had been a factor in raising and stabilizing the price of gasoline.[8]

Both the witnesses,[9] and the writers of the letters,[10] however, agreed with the Secretary of the Interior, however, that a number of other factors contributed to the behavior of the tank-car market in 1935 and 1936. One of the Government counsel conceded this in his closing argument to the jury, saying:

> "The Connally Act * * * was effective in shutting off hot oil, * * * and to the extent that it reduced that supply of hot oil of course it had its effect, a legal effect, a proper effect on price; and

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[6]Lanzer, R. 262; Bradshaw, R. 687, 694, 695, 699, 700; Steiger, R. 752-3, 754; Franklin, R. 989; Shatford, R. 1065, 1068; cross, R. 1103, 1105; Van Covern, R. 1512.

[7]Shatford, R. 1065, 1068.

[8]Govt. Exs. 75, R. 2689; 182, R. 2737; 218, R. 2819; 251, R. 2846; 253, R. 2852; 268, R. 2882; 272, R. 2894; 281, R. 2921; 284, R. 2924; 295, R. 2950; 682, R. 3112; 683, R. 3112; 685, R. 3115; and 686, R. 3116.

[9]See pp. 247-52, *infra*.

[10]Typical comments along these lines are collected in note 3 at page 69 of the respondents' brief.

I would not be blind enough to say that there were not other forces.

"We were coming out of a depression; there was greater seasonal demand, * * * and I would not stand here and say for one minute, gentlemen, that the refinery allocations that were put into effect in 1934 as the result of the refinery amendment to the code * * * did not have its effect also on the raise in the tank car price."[11]

B. Comparison of retail prices inside and outside the Mid-Western area in 1935 and 1936.

The Mid-Western area is the normal market for gasoline from the Mid-Continent area.[1] Furthermore the policies of Standard of Indiana, the market leader which sells some 22% of the gasoline sold in the area tend to maintain a fairly constant relationship between the wholesale price of gasoline in the Group 3 tank-car market and the retail price in the Mid-Western area.[2]

A comparison of the average retail price of gasoline in 20 to 30 representative cities in the Mid-Western area and the average retail price in a hundred-odd cities outside the area,[3] however, revealed that the retail price of gasoline was lower in the Mid-Western area than it was in the rest of the country, throughout the indictment period.[4] In all but four weeks in 1935 and in all but seven weeks in 1936 the retail price inside the area was lower than the price outside the area. In 1934, on the other hand, the price inside the area was higher during

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[11]R. 2063, 2064.
[1]McDowell, R. 1166.
[2]Marshall, R. 1232 *et seq.*
[3]J. D. Miller, redirect, R. 1629.
[4]Def. Ex. 1013, R. 3791; J. D. Miller, R. 1625-8.

fourteen weeks and the same during one week. In other words, the price was higher inside the area than in the rest of the country 26.1% of the time in 1934, while it was the same or higher only 7.6% of the time in 1935 and only 13.4% of the time in 1936.[5]

It also appears that the retail price in the Mid-Western area rose less than the price outside the area in 1935. Between March 1 and June 1, 1935, retail prices within the Mid-Western area rose only 72 one-hundredths of a cent. Outside the area they rose 74 one-hundredths of a cent during the same period.[6]

C. Comparison between the respondents' purchases and the course of prices on the spot tank-car market.

1. *The March, 1935 price rise.*

There was no correlation between the start of the 1935 price rise and the start of the buying program. The price rise commenced on March 2, 1935, *a week before the Mid-Continent Buying Program had started.* During that week the market registered a 3/8¢ gain.[1] The beginning of the price rise coincided almost exactly with the installation of the new Federal Tender Board in the East Texas field under the Connally Act, and the issuance of the first Federal Tenders thereunder.[2]

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[5]Def. Ex. 1013, R. 3791; J. D. Miller, R. 1625-9.

[6]Swensrud, cross, R. 1462.

[1]Def. Ex. 712, R. 3173; Cf. McDowell, R. 1201. If mere purchasing be considered without regard to the existence of a program, it might be noted that substantial purchases had occurred in January and February when prices were depressed (J. D. Miller, R. 1635, 1636).

[2]Van Covern, R. 1512.

[*The respondents offered to show* that a similar price rise occurred in October, 1934, when the first Federal Tender Board went into operation under Section 9(c) of the N.I.R.A., later held unconstitutional. The excluded evidence would have shown that between October 17 and November 9, 1934 the quotations for third grade gasoline rose from 2⅞-3¼¢ and 2½-3¢ to 4⅛-4¼¢ and 4-4¼¢, almost exactly paralleling the rise which took place after March 2, 1935 when the second Federal Tender Board went into operation.[3]]

2. *Price fluctuations during the indictment period generally.*

There was no correlation between the amount of gasoline which the major companies were buying and the trend of prices on the tank-car market at any time during the indictment period. Major company purchasing was lightest during March, April, and May, 1935, when the market was rising. It was heaviest in May, June, July, August and September, 1936, during which period the price declined ½¢. The volume of major company buying in 1936 when the prices were going down was approximately 53% higher than the volume of buying in the spring of 1935 when prices were going up. On the other hand, in October and November of 1936, prices rose ¼¢, although major company purchasing decreased 38% in volume.[4]

3. *The price decline in 1936.*

There was no correlation between the respondents' purchasing activities and the decline in prices in 1936. The

[3]Def. Ex. 849 for identification, R. 3389; Def. Ex. 868, R. 3433; Shatford offer, R. 1061-2; Van Covern offer, R. 1498-500.

[4]J. D. Miller, R. 1640-1.

first declines occurred in February, 1936, while the Mid-Continent buying program was still operating.[5]

As a matter of fact, major company purchasing did not cease with the abandonment of the "program" in April, 1936. Purchasing during the last eight months of 1936 was 27% heavier than during the 14 months of the indictment period. The great bulk of this occurred during the five months from May through September when the price was going down. Major company purchases averaged 650 cars a month more during May, June, July, August and September, 1936, when the market was going down, than they did in March, April, and May, 1935, when the market was going up.[6]

D. During the indictment period, certain factors which had previously made for instability in the market were eliminated.

The Government claimed that prices during the indictment period displayed a rigidity which was without parallel in the history of the industry. Its witnesses testified that there had been much greater fluctuation in prior years, and that it was most unusual for prices to be so stable as they were during the last half of 1935.[1]

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[5]Def. Ex. 713, R. 3177; see Breuch, R. 281. The Government attempted to show a correlation between the price decline in the spring of 1936 and the commencement of the first Grand Jury investigation in Madison in May. Beroth testified that the first small breaks in the tank-car market in 1936 occurred in May and June, at about the time he testified before the Grand Jury at Madison (Beroth 196). The charts showing the actual course of the market journal quotations showed that Beroth was wrong.

[6]J. D. Miller, R. 1640-1.

[1]Beroth, R. 193, 194; cross R. 222-3; Lanzer, R. 248; Breuch, R. 281-2.

The record, however, shows that there was no longer any reason for a change in the price level during this period except on January 9, 1936 when the price of crude oil rose 10% and was followed by the price of gasoline. On the contrary, conditions which had previously made for instability were eliminated, as follows:

(1) Up until 1933 the oil producing states had never attempted to coordinate the administration of their conservation laws so as to balance the production of crude oil with the consumptive demand for gasoline. Under the Code, however, state allowables regarding crude oil production were conformed with the Bureau of Mines' estimates of gasoline consumption.[2] In the spring when the gasoline consumption curve rose, an increase in crude oil production was permitted. In the fall when gasoline consumption fell off, the state allowables were reduced and the production of the raw material curtailed to correspond with the drop in gasoline consumption.[3] After the Code, the oil states continued the same practice under an Interstate Compact, specifically authorized by Congress, which permitted them to agree with each other as to the quantities of crude oil which they would allow to be produced.[4]

(2) It had never before been possible to enforce the state conservation laws for any extended period as it was after the Connally Act became effective in March 1935.[5] Throughout 1933 and 1934 the East Texas field had pro-

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[2]Shatford, R. 1002-3, 1070; Fischer, R. 1115.

[3]Franklin, R. 989; see Def. Ex. 954, R. 3653.

[4]Franklin, R. 987-9; Fischer, R. 1115; Van Covern, R. 1513.

[5]Beroth, cross, R. 223; Lanzer, cross, R. 258, 259-60; Franklin, R. 986; Shatford, R. 1063, 1064, 1068, 1070.

duced from one hundred and fifty to two hundred thousand barrels of crude oil a day in excess of the State Railroad Commission's allowables,[6] and gasoline produced from this excess crude oil had gone into interstate commerce.[7] After March 1, 1935 there was very little excess production in East Texas,[8] and no hot gasoline whatever went into interstate commerce.[9] This new factor, too, continued to operate after the Code, for the *Schechter* decision did not affect the Connally Act.

(3) The sudden elimination of hot oil in March, 1935 meant that all producers now had to pay one dollar a barrel for crude. Hitherto there had been two prices for crude oil (a) the price for legal crude oil which was $1.00, and (b) the price for hot oil. The price for legal crude was steady at a dollar during the entire period from September, 1933 to January, 1936. The hot oil price was a fluctuating price of from 25¢ to 35¢ a barrel or less and was paid for a bootleg product which came on the market from time to time in varying quantities. The gasoline produced from hot oil necessarily forced the price of gasoline produced from legal crude down far below cost.[10] After the Connally Act, all crude oil from which gasoline for shipment into the Mid-Western area could be manufactured, sold for the legal crude price of a dollar a barrel and fluctuations in the price of raw material ceased entirely. This

[6]Fischer, R. 1115-6.

[7]Fischer, R. 1117.

[8]Franklin testified that during March 1935, or shortly thereafter, excess production in East Texas fell off to approximately 5000 barrels a day (Franklin, R. 986).

[9]Dyer, R. 1466.

[10]Franklin, R. 985; Shatford, R. 1063.

inevitably had a strong stabilizing effect on the price of gasoline.[11] [*The respondents offered to prove* that crude oil and gasoline prices had risen and fallen and maintained a constant relationship with each other during the entire period from January, 1918 until August, 1933 when the price of crude oil was pegged at a dollar and there came to be a separate price for illegal crude.[12]]

(4) Beginning in the spring of 1935 there was an enormous and unprecedented increase in demand which continued throughout 1935 and 1936. In 1933 and 1934 consumption had been subnormal. Beginning in February, 1935, however, every month showed an increase over the corresponding month in the previous year. Consumption for the entire year 1935 was 7% more than for 1934. That for 1936 was 9.5% over 1935.[13]

(5) When this increase in consumption began in February, 1935, and up until the end of the Code, the various factors of supply were regulated in the manner which had never been attempted before the Code. Imports of crude oil were limited by executive order.[14] Crude oil could be withdrawn from storage only with the approval of Secretary Ickes;[15] gasoline could be manufactured only in the amounts specified by the Department of the Interior and

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[11]Shatford, R. 1064.

[12]Def. Ex. 955 for identification, R. 3657; Van Covern offer, R. 1518-9.

[13]Brench, cross, R. 285; Barkdull, cross, R. 874; Franklin, R. 986; Shatford, R. 1065-68; Van Covern, R. 1480-1, 1504; Def. Exs. 948, R. 3641, 953, 3649; Shatford, R. 1067.

[14]Franklin, R. 986.

[15]Franklin, R. 986-7; Shatfc d, R. 1003.

the Code authorities.[16] Gasoline inventories had been seriously reduced by the operation of the refinery control system.[17] In March, 1935 they were still further reduced by almost a million barrels through the voluntary curtailment program undertaken with the approval of Secretary Ickes.[18] Thus, at the very time when it needed gasoline most, the industry was operating "in hobbles"[19] with inventories which were quite inadequate to supply the demand. This situation could not be remedied until long after the Code. The demand was so heavy that the industry withdrew from storage and refined 23,000,000 barrels of crude oil in twelve months, and still was not able to restore its depleted gasoline inventories.[20]

(6) Finally, the years 1935 and 1936 were distinguished from prior years by the fact that general business conditions were improving and prices were rising everywhere.[21]

[*The Defense offered* Exhibit 958[22] for identification, a chart showing the course of prices for commodities other than gasoline during the indictment period. The excluded exhibit would have shown: (a) that gasoline prices were much more depressed than the prices of other commodities and the cost of living in 1933 and 1934, (b) that gasoline prices recovered less than the prices of other com-

[16] Shatford, R. 1008-9, 1025, 1074; Franklin, R. 948-9; Arnott, R. 1719; Collett, R. 1804-5. See also Shatford, R. 1001-2, 1006-7, 1010-11, re the original refinery control system under the Code.

[17] Franklin, R. 989; Shatford, R. 1068.

[18] Shatford, R. 1034. See p. 240, *supra*.

[19] Shatford, R. 1068.

[20] Shatford, R. 1070; Van Covern, R. 1488-9, 1508-10; Def. Exs. 949, R. 3642; 953, R. 3649; 951, R. 3644; 952, R. 3645.

[21] Breuch, cross, R. 285; Barkdull, cross, R. 874; Franklin, R. 989.

[22] R. 3669.

modities and the cost of living, and (c) that gasoline prices rose less sharply in 1935 and 1936 than the prices of other commodities and the cost of living.]

E. Under the conditions which existed during the indictment period, stability in the market was to be expected.

1. *The behavior of the market from October to December, 1934.*

[As noted above,[1] the Defense offered to prove that the price rise in March, 1935, when the Federal Tender Board commenced operations under the Connally Act exactly paralleled, and was in fact a continuation of a prior price rise which occurred in October and November, 1934, when the first Federal Tender Board commenced operations under Section 9(c) of the N. I. R. A.

[*The Defense also offered to prove* that the causes of the price rise in October and November, 1934, were the same as the causes of the price rise in March, 1935. The excluded evidence was as follows:

[In October, 1934, as in January, 1935, almost every factor in the statistical position of the industry tended to produce higher prices. Crude oil inventories were at the proper level. Gasoline demand was increasing not only over the demand for the prevous year, but over the Bureau of Mines' estimates. Gasoline inventories were very low. In fact they were below the industry's minimum requirements because the refinery control system under the revised Article IV of the Petroleum Code and the unanticipated demand for gasoline had operated to force refiners, es-

[1] See pp. 245-6, *supra*.

pecially major companies, to reduce inventories without making the usual seasonal build-up.[2]

[As in January, 1935, however, there was one factor which influenced the price of gasoline adversely—the Administration's failure to control the production of hot oil. Overproduction was increasing steadily and in October reached the highest point in sixteen months. This overproduction in turn led to the manufacture of cheap gasoline which competed with gasoline manufactured from legal crude. The effect of this one adverse factor was so great that it was forcing the price of gasoline downward.[3]

[On October 25, 1934, however, the first Federal Tender Board held its first hearing in the East Texas field. The situation in the field was immediately improved. Many of the refineries previously operating on hot oil closed down, and the number of tank-cars of hot gasoline in interstate commerce was reduced to almost nothing. With the only really unfavorable factor in the situation eliminated, the trend of gasoline prices reversed itself and advanced sharply.[4]

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[2]Van Covern offer, R. 1493-8. Inventories are customarily at the lowest level in September (Van Covern offer, R. 1495). On October 18, 1934, Secretary Ickes took cognizance of the fact that gasoline inventories were at a dangerously low level by ordering that if, after all possible adjustments within the limits of the November allocation and if, as a result of appeals to the Board of Review, it was indicated that inventories had fallen below levels which would permit even and economical operations, the company so affected would be permitted to manufacture additional gasoline (Van Covern offer, R. 1495-6). In recognition of the condition of gasoline inventories and also in recognition of the increased gasoline demand, the Administrator increased his recommendation of crude oil production on December 17 for the period from that date to the end of the month (Van Covern offer, R. 1497).

[3]Van Covern offer, R. 1493, 1499.

[4]Shatford offer, R. 1062; Van Covern offer, R. 1499, 1500.

[During the latter part of November and early part of December, 1934, gasoline demand was considerably higher than had been forecasted, inventories of gasoline continued downward, the overproduction of gasoline in East Texas was reduced to a small amount, and crude oil inventories throughout the country declined substantially. These factors would have tended to push the price up further, had it not been for the fact that the Federal Tender Board was under attack in the court; its effectiveness was impaired by injunctions; and it was feared that the tremendous potentialities of the East Texas field would again be turned lose.[5] During December, 1934, as a result of the continued uncertainty in East Texas concerning the operation of the Federal Tender Board, the price actually declined. Furthermore, the hot oil refiners had learned by this time that they could ship illegal gasoline from one point to another within the State of Texas and then divert it into interstate commerce. The movement of illegal gasoline in Texas also displaced some legal gasoline within the state which consequently had to be dumped into interstate commerce at low prices.[6]

[Late in December, the State of Texas required tenders for the shipment of petroleum products in intrastate commerce, and so prevented the movement of illegal gasoline within Texas. The overproduction of crude oil in East Texas decreased substantially, and as crude oil inventories declined still further and gasoline demand continued above the estimates of the Bureau of Mines, prices made a slight recovery.[7]

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[5] Van Covern offer, R. 1500.
[6] Van Covern offer, R. 1500-1.
[7] Van Covern offer, R. 1501.

[Had there been no uncertainty concerning the authority for the Federal Tender Board created under Section 9(c) of the National Industrial Recovery Act, there would probably have been a sustained increase in the price of gasoline to a level bringing it into an approximate parity with the price of crude oil. The price of gasoline would have risen to higher levels and would have continued to rise and would have reached parity long before June, 1935.[8]]

2. *The Behavior of the market in 1935 and 1936.*

The prices which had obtained at the end of December 1934, continued during the first week in January, 1935. The statistical situation of the industry was fairly strong. The demand for gasoline was somewhat lower than it had been the year before, but was still higher than had been expected. Crude oil production was a trifle in excess of the Bureau of Mines' recommendations, but at a lower level than during previous periods. Inventories were high but under control because of the necessity of obtaining permission from the Petroleum Administrator before making withdrawals from storage.[9]

The hot oil problem in East Texas, however, was still a disturbing factor in the situation. When the Supreme Court declared Section 9(c) of the N. I. R. A. invalid in January, the potential production of the field made itself felt and the hot oil refineries which began shipping in interstate commerce. As a result, the price dropped off.[10] The relatively slight increase in demand during February failed

[8]Van Covern offer, R. 1502.

[9]Van Covern offer, R. 1510.

[10]Dyer, R. 1466, 1467-9; Def. Ex. 713, R. 3177; Van Covern, R. 1510, 1511.

to measure up to expectations and stocks increased slightly above the seasonal norm. The market remained depressed.[11]

On March 1, however, a new Federal Tender Board was appointed under the Connally Act, and on March 4 the first federal tenders were issued.[12] Everyone in the industry, including the hot oil runners in East Texas, realized that this law would have to be obeyed and that the East Texas refiners would have to run on legally produced, $1.00 crude oil. The number of hot oil refiners decreased until there were only 14; eight of them shipping in interstate commerce and six of them shipping on state tenders.[13] The price started to rise when the first federal tenders were issued under the Connally Act.[14] Between March 2nd and March 8th, the quotations for third grade gasoline in the Chicago Journal of Commerce rose 3/8¢ and those in Platt's Oilgram 1/4¢.[15]

The next three months were characterized by a number of factors making for higher prices. Demand on the retail market increased 4.2% over the previous year in March; 6% in April; and 3% in May. Everyone was forced to go into the market and buy: major companies, jobbers, and brokers.[16] The resulting decline in gasoline stocks wiped out the excess inventories which had existed in February, and reduced the total inventories to a point below the seasonal requirements. Even crude oil inventories

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[11]Van Covern, R. 1511.

[12]*Ibid.*

[13]Bradshaw, cross, R. 705, 706-7; Def. Ex. 989, R. 3737, 3738-9; Van Covern, R. 1511-2.

[14]Van Covern, R. 1511, 1512. The Mid-Continent Buying Program did not start until March 8. *Cf.* McDowell, R. 1201-2.

[15]Def. Ex. 1024, R. 3807.

[16]Lanzer, redirect, R. 261; J. D. Miller, R. 1570; Van Covern, R. 1512.

were soon reduced by withdrawals from storage made necessary by the increase of demand for gasoline.[17]

With demand balancing and even overbalancing supply in this way, the price of gasoline necessarily rose from the distress levels of the winter. Insofar as major company buying removed distress gasoline which was overhanging and depressing the market, it also had an effect on price.[18]

The next seven months saw a "plateau," during which, with the exception of slight fluctuations in the price of third grade gasoline in November and December, the market journal quotations for both grades remained at the levels which they had reached during the first week in June.

During this entire period conditions were entirely different from any that had prevailed in the industry in prior years. Production of crude oil was by state action conformed to the consumption of gasoline. The states set their production allowables in accordance with the United States Bureau of Mines' estimates of how much gasoline would be burned during the coming month.[19] In August, 1935, the principal oil-producing states entered into an interstate compact under which this procedure was followed by all of them. The production of crude in excess of state allowables was for the first time completely extinguished insofar as it affected gasoline to be shipped into the Mid-Western area. The price of crude oil, the raw material of gasoline, was absolutely stable.[20] Constantly increasing and record-breaking demand for gasoline tended to take up any slack which developed.[21]

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[17]Van Covern, R. 1512, 1513.

[18]Van Covern, R. 1512.

[19]Van Covern, R. 1513; Def. Exs. 953, 954, R. 3649, 3653.

[20]See Van Covern, R. 1476.

[21]The Government tried to show through Beroth that this rise occurred in spite of a decline in demand which should normally have

Two witnesses called by the respondents, John E. Shatford and Fred Van Covern, testified without contradiction at pages 1070-2 and 1476, 1513-4 of the record that the factors affecting supply and demand had reached such a state of balance during this period that a relatively stable price would be the natural result in a normal competitive market.

A gasoline price rise occurred on January 10-12, 1936.[22] It followed immediately an increase in the price of crude oil which took place on January 9, 1936.[23] The price of East Texas crude rose from $1.00 to $1.15 a barrel and that of Oklahoma crude from $1.00 to $1.10 a barrel. The rise in crude prices followed extremely heavy drafts on crude inventories amounting to 22,000,000 barrels during the year. Gasoline demand for December had been 14.7% in excess of that for December, 1934, and had exceeded all previous records for the month. January gasoline demand increased even more drastically, exceeding January, 1935, by 15.5%. At the same time gasoline stocks were held down close to season requirements and crude oil production, although some 9,500,000 barrels more than that recommended by the Bureau of Mines, was insufficient to prevent withdrawal of some 1,800,000 barrels from storage.[24]

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resulted in a decline in price (Beroth, R. 195, 196). Beroth, however, admitted on cross examination that he did not actually know whether the actual consumption of gasoline in the Mid-Western area (as opposed to his own sales) had been good or bad in December, 1935, and January, 1936. Bradshaw testified that the winter of 1935-36 was a pretty good consuming season throughout the country (Bradshaw, R. 678). The evidence described in the following pages showed that Beroth was wrong and that Bradshaw was right.

[22]Van Covern, R. 1514; Lanzer, cross, R. 262.

[23]Van Covern, R. 1514; Shatford, R. 1072; Beroth, cross, R. 224.

[24]Van Covern, R. 1514.

In February, 1936, for the first time in many months, the demand for gasoline was less than that anticipated by the Bureau of Mines.[25] As a result, there was a more than seasonal increase in gasoline inventories.[26] February also saw a new demoralizing factor introduced in the situation in the appearance of no-octane gasoline[27] from the Rodessa field in Louisiana. The field had been discovered in 1935, but did not become an important factor in the market until the latter part of January, 1936. It was thought at one time that the field would create another East Texas problem, since Louisiana did not have a proration law.[28] This led to a temporary price decline in February, which ended when Louisiana began to regulate production in the Rodessa field. In May the influx of gasoline from the Rodessa field again increased substantially. As a result prices declined in spite of increased demand.[29]

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[25] *Ibid.* Shatford described this as the first "soft spot" in demand in fourteen months (Shatford, cross, R. 1096).

[26] Van Covern, R. 1514.

[27] This term was applied to the gasoline from the Rodessa field because it had a very low octane or anti-knock rating (Van Covern, R. 1515).

[28] Van Covern, R. 1515.

[29] *Ibid.* The further decline in price in June, 1936, was attributable to the continued effect of no-octane gasoline from the Rodessa field. The price level, however, became somewhat more stable in July and the early part of August. In the latter part of August and September, there was a further price decline due to the surplus in gasoline inventories which became a real menace as the high consuming season neared an end (Van Covern, R. 1516). The demand picked up during October and early November, 1936, and held prices fairly stationary. During September, October, and November seasonal inventories reached such a low level that prices even registered a slight increase. The new level was held throughout December, which was again characterized by an increase in demand. (*Ibid.*)

X.

The Power to Fix Prices.

The record shows that the mere fact that a combination of companies sells most of the gasoline in an area, does not in itself confer upon it the power to exact arbitrary and non-competitive prices. The competition of concerns doing a relatively small volume of business is effective to keep the market price on a competitive basis.[1]

A. The amount of gasoline sold by the respondents and their alleged co-conspirators.

There were 4,917,273,000 gallons of gasoline sold in the Mid-Western area in 1935. Of this the respondents sold 2,507,089,119 gallons.[1] The former defendants which were dismissed because they had been dissolved or reorganized (Deep Rock, Cities Service Export, Louisiana Oil and Tide Water Oil) sold 121,500,000 gallons.[2] The total for the two groups combined was therefore only 2,628,589,119 gallons, or *less than 54% of the gasoline sold in the territory.*

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[1]Marshall, R. 1244; Swensrud, R. 1388, 1390-1.

[1]Def. Ex. 1028, R. 3812. This is a maximum figure inasmuch as it includes gasoline sold by Globe of Kansas which could not be segregated from that sold by the other Globe companies.

[2]Def. Ex. 1028, R. 3812. The former defendant Texas, which was dismissed, and Standard of Indiana and Barnsdall, which were granted new trials, sold 1,427,178,871 gallons. (*Ibid.*) No figures are available for the dismissed defendant Gulf, but it appears that its gallonage is comparatively small (Beroth, R. 187-8). The defendants originally indicted thus sold about 82.5% of the gasoline in the territory. See Beroth, R. 186, 188.

B. The refinery capacity of the respondents and their alleged co-conspirators.

Most of the gasoline sold in the Mid-Western area comes from refineries in the area itself and in the Mid-Continent and East Texas oil fields.[1]

In 1935 the total operating refinery capacity of this territory was 1,066,050 barrels of distillation capacity and 601,394 barrels of cracking capacity. The total shut-down capacity was 258,700 barrels of distillation capacity and 115,156 barrels of cracking capacity. Of this the respondents and the defendants which had been dissolved or reorganized controlled the following:[2]

	Operating		Shut-Down	
	Distillation	*Cracking*	*Distillation*	*Cracking*
Respondents	443,500	276,900	27,000	30,600
Defendants which had been dissolved or reorganized	38,000	29,000	18,000	None
Two groups combined.	481,500	305,900	45,000	30,600
Percent of total.....	45.16%	50.88%	17.39%	26.57%

[1]Beroth, R. 181, 183.

[2]Def. Ex. 939, R. 3611.

[3]The figures for the seven companies which were dismissed or granted new trials because of failure of proof are as follows:

	Operating		Shut-down	
Name of Company	Distillation	Cracking	Distillation	Cracking
Barnsdall Refining Corp.	21,000	9,000		1,000
Cities Service Co.				
Globe Oil & Ref. Co. (Kas.)	10,000	6,000		
Gulf Oil Corp.				
Gulf Refining Co.	11,000	10,000		
Standard of Indiana	138,500	108,594	1,500	28,256
Texas Company	61,000	43,700		
Tide Water Associated				
Totals	241,500	177,294	1,500	29,256

It thus appears that some 50% of the refinery capacity in the area was not controlled by the respondents or their alleged co-conspirators. So far as location went, these uncontrolled refineries were in as good a position as those of the respondents to furnish gasoline in the Mid-Western area. For instance, there were independent refiners in the States of Illinois, Indiana, Kansas and Michigan who were not alleged to have participated in the alleged conspiracy, and who had a daily cracking capacity of 59,750 barrels per day and a daily cracking capacity of 14,200 barrels per day. These refiners would actually enjoy a competitive advantage over the respondents and alleged co-conspirators whose refineries were located in Oklahoma and Texas.[4] Refiners who were located in Oklahoma, Arkansas, Louisiana and Texas would at least enjoy a competitive equality with the respondents and alleged co-conspirators whose refineries were located in those states.[5]

The shut-down capacity of refiners not claimed to have participated in the alleged conspiracy would also have to be recognized as a potential factor in the competitive situation.[6] Many of them were shut down because of the

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[4]Swensrud, R. 1406-7.

[5]As a result of the practice of calculating freight rates by "groups," gasoline can be shipped from almost any point in Oklahoma ("Group 3") to any point in the Mid-Western area as cheaply as from any other point in Oklahoma. Similarly, any refiner in the Fort Worth group, which embraces the East Texas field and most of North-Central Texas, is on a parity with any other refiner in that group. The same is true of refiners in the "El Dorado-Shreveport Group" which embraces Southeastern Arkansas and Northeastern Missouri. (Swensrud, R. 1398. See also Def. Ex. 936, R. 3601.)

[6]Swensrud, R. 1417.

extreme distress caused by the lack of parity betwe
the prices of crude oil and gasoline. Some of them
opened when conditions improved.[7] Many more cou
have reopened had prices risen higher than the compe
tive conditions justified.[8]

C. Operating refineries outside the indictment territory

In addition to the uncontrolled refineries in the i
dictment territory, there were many more such refineri
outside, but near enough to the territory to ship gasoli
into the Mid-Western area.[1] These refineries were si
uated at such points as Toledo, Lima, Findlay and Ci
cinnati, Ohio; Latonia and Louisville, Kentucky; Weste
Pennsylvania, Southern Missouri, Central Texas, an
Montana and Wyoming,[2] and on the Gulf Coast (the lar
est refinery area in the world.)[3] In 1935 they had a
operating distillation capacity of 230,000 barrels a da
and an operating cracking capacity of 101,000 barrels p
day.[4]

In general these refiners outside of the indictme
territory suffer a freight disadvantage as against r
finers inside the territory when shipping gasoline into t
Mid-Western area. However, this disadvantage is oft
slight and non-existent. Many refineries are almost on t

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[7]Swensrud, R. 1418-9.
[8]Swensrud, R. 1419.
[1]Swensrud, R. 1395.
[2]Swensrud, R. 1395-6, 1397.
[3]The so-called "San Antonio-Houston" and "Baton Rouge-N
Orleans" freight groups. (Swensrud, R. 1396, 1397. See Def. F
936, R. 3601.)
[4]Def. Ex. 941, R. 3611. Swensrud, R. 1412.

borders of the Mid-Western area. The Ohio refineries are very close to Indiana. The Cincinnati, Latonia, and Louisville refineries are almost across the river from Indiana. Toledo is very close to Michigan.[5] The Gulf Coast refineries are only a little farther south than the Mid-Continent and East Texas ones.[6]

In many cases it is actually cheaper to ship gasoline into the Mid-Western area from the points outside the indictment area than from points inside.[7] It costs 3.894¢ per gallon to ship gasoline from Oklahoma to Detroit; it costs 1.84¢ to ship it from Louisville. It costs four-tenths of a cent a gallon less to ship gasoline to Indianapolis from Baltimore than from Oklahoma. It costs a cent less to ship gasoline from Montana to Bismark, N. D., than it does to ship it from Oklahoma.[8] Even cities like Madison and Chicago which are situated in the heart of the Mid-Western area, can procure gasoline from such places as Louisville and Toledo more cheaply than from Group 3, and they can obtain it from the Gulf Coast at only slightly greater expense.[9]

The following table[10] shows how the freight rates (in cents per gallon) from refinery centers outside the indictment territory to various points in the Mid-Western area compare with those from Group 3 in Oklahoma:

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[5]Swensrud, R. 1395-6.

[6]Swensrud, R. 1396.

[7]Swensrud, R. 1396, 1399, 1397-8, 1415. Def. Exs. 936, R. 3601 and 937, R. 3605.

[8]Swensrud, R. 1399.

[9]Swensrud, R. 1415, 1416.

[10]Made up from Def. Exs. 936, R. 3601 and 937, R. 3605, and from Swensrud's testimony at R. 1399, 1415-6.

From	To Bismark	To Chicago	To Detroit	To Indianapolis	To Madison	To St. Louis
Group 3	4.686	2.440	3.894	2.970	2.838	2.178
El Dorado - Shreveport Group		2.440	3.894	2.970	2.838	2.046
Fort Worth Group		2.600		3.135	3.003	2.211
Houston Group		2.600		3.135	3.102	
Baton Rouge-New Orleans Group		2.540	3.894	2.970	2.772	2.140
Warren) Rouseville) Oil City)		2.100	1.716	1.980	2.442	2.640
Toledo		1.580	.528	1.518	1.848	2.046
Louisville		1.700	1.848	.099	2.046	1.650
Baltimore		2.830	2.442	2.574		3.102
Laurel Billings	3.564					
Cody	4.026					
Casper	4.224					

It is also possible to reach many points in the Mid-Western area by water.[11] The area is crossed or bordered by a number of navigable waterways—the Great Lakes, the Mississippi, Missouri, Ohio and Illinois Rivers, and the Chicago drainage canal, and these are supplemented by waterways outside the area such as the St. Lawrence River, the Sault Ste. Marie Canal, the Erie Canal, and the Houston Ship Channel.[12] As shown by Exhibit 938, 85% of the Mid-Western area's larger cities and 70% of its total population lie within 50 miles of these navigable waters.[13]

Transportation by water is only about half as expensive as transportation by rail.[14] Gasoline can be sent from Buffalo to Chicago by tanker for as little as ½¢ a gallon. It can be shipped from New Orleans to Chicago for about a cent.[15] Once gasoline is brought to a ter-

[11] Swensrud, R. 1419. Def. Ex. 938, R. 3609.
[12] Swensrud, R. 1419-20, 1422-3
[13] Swensrud, R. 1424-5.
[14] Swensrud, R. 1425.
[15] Swensrud, R. 1422.

minal, it can be trans-shipped and carried 50 miles inland by truck for as little as ½¢ a gallon. The average cost of trucking within a fifty-mile range would be less than ¼¢ per gallon.[16]

Within the past eight or ten years the use of water transportation has become an important factor in the distribution of gasoline,[17] and it is steadily increasing. In 1935, for instance, 3,500,000 barrels of oil moved through the Louisville district of the Mississippi and Ohio Rivers. In 1936, the figure was 6,251,000 barrels.[18] Several of the major companies have now established water terminals at Minneapolis.[19] Most of the large refineries in Chicago maintain terminals at various points around the Great Lakes and use them to trans-ship gasoline shipped from Chicago by water.[20]

Whether by rail or by water, many refineries outside the Mid-Western area are already shipping gasoline into the area. The Sun Oil Company, with refineries in Toledo, sold 5,227,013 gallons of gasoline in Michigan in October, 1936;[21] Gulf, with refineries at Toledo and Cincinnati, sold 3,933,685 gallons.[22] The Standard Oil Company of Ohio sells gasoline from its Toledo and Lima refineries in Michigan and Indiana. The Aetna Oil Company in Louisville sells in Indiana. So does a Standard of Ohio subsidiary in Covington. The refineries in Western Pennsylvania ship gasoline into the Mid-Western area from time to time. A

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[16]Swensrud, R. 1425.
[17]Swensrud, R. 1423.
[18]Swensrud, R. 1419-20.
[19]Swensrud, R. 1421-2.
[20]Swensrud, R. 1423.
[21]Swensrud, R. 1407.
[22]Swensrud, R. 1408, 1411-2.

number of refineries in Montana and Wyoming ship gasoline into the Dakotas. Gulf, Texas, The National Refining Company and the Ohio Oil Company, with refineries both inside and outside the indictment territory, sell in the Mid-Western area. The Standard Oil Company of New Jersey, with a refinery at Baton Rouge, moves a great deal of gasoline up the Mississippi and sells some gasoline (whether from Baton Rouge or elsewhere) in St. Louis.[23]

D. The impracticability of attempting to fix and maintain an artificially high price for gasoline in the spot tank-car market and retail market in the Mid-Western area.

Assuming the truth of all the essential allegations of the indictment, it would have been impossible for the respondents to have raised the tank-car and retail price of gasoline in the Mid-Western area to artificially high and non-competitive levels. As soon as the price in the area rose above the cost of manufacture, cheaper gasoline would have begun to flow into the area from the refineries, both inside and outside the indictment territory, which were not owned by the respondents and the alleged co-conspirators. The refiners who were not parties to the alleged conspiracy would have seized the opportunity to increase their business, acquire jobbers and build service stations in the territory and undersell the respondents and their alleged co-conspirators.[1]

The "outside refiners" would have had a powerful incentive to do this because the costs of manufacturing and marketing gasoline are largely fixed costs which remain

[23]Swensrud, R. 1408-9.
[1]Swensrud, R. 1390-2.

relatively constant in the face of increased volume. Thus increased volume would have brought them *not only larger gross sales but larger profits per unit sold.*[2]

Primarily, the outside refiners would have carried on their invasion of the market in the Mid-Western area by cutting the price to jobbers—*i. e.*, by offering them wider margins or special concessions such as larger advertising allowances or reduced rentals for service stations.[3] The jobbers would have reacted even more quickly than consumers to discrepancies in prices because they sell in much greater volumes—a jobber might shift his patronage for as little as ⅛¢ increase in margin.[4] Hence, if one refiner had made a price concession to his jobbers, the others would have had to follow suit. Otherwise, when their contracts expired, their jobbers would have sought other suppliers.[5]

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[2]Swensrud, R. 1426.

[3]Swensrud, R. 1392. It was suggested to the witness that the outside refiners might have had difficulty (a) in obtaining crude oil to refine and (b) in obtaining jobbers who were not already tied up under long term contracts.

As to crude oil, the witness explained that "the state production allocations were based on 'nominations' by the refiners, *i. e.*, estimates of the amounts they could use (Swensrud, R. 1394). A refiner never has any difficulty in getting all the crude he needs (Swensrud, R. 1394, 1395). If he can't get it from producers, he can get it from storage or from pipe-line companies (Swensrud, R. 1395). There were no restrictions on withdrawals from storage after the Code. (*Ibid.*)

As to jobbers, the witness explained that the long term jobber contracts do not all expire at the same time. Hence, a number of jobbers are constantly becoming free to contract with other suppliers if they choose. Furthermore, a large number of contracts have usually already expired so that the jobbers are continued on a month to month basis. As a last resort the outside refiners could persuade new jobbers to enter the business (Swensrud, R. 1392-3).

[4]Swensrud, R. 1388.

[5]Swensrud, R. 1389.

Even if the outside refiners did not sell through jobbers, they would have affected the wholesale market by offering gasoline to the public at lower prices. Their competitors (both refiners and jobbers) would have had to help their dealers meet this competition by cutting the price to dealers, and would have had to protect their jobbers by cutting the price to them, a procedure which would inevitably have reacted on the tank-car market.[6]

The outside refiners who came in this way and sold gasoline, either through jobbers or directly to the consumers, at prices below those which the defendants were attempting to maintain, would soon have captured a large share of the market. "They would just be handed the market on a silver platter."[7] For, as noted in the next section,[8] gasoline consumers react very quickly to a discrepancy in price, and as soon as one marketer sells a cent or so below his competitors, he gets a large share of the business,[9] and the refiners who try to sell at higher prices suffer an immediate and drastic loss of gallonage.[10]

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[6]Swensrud, R. 1388-90. Many of the outside refiners, especially the smaller ones, could sell only third grade gasoline. If, however, they sold it cheaper than their competitors, they would soon drag down the price of regular gasoline as well. All grades of gasoline are inter-related, and if the price of one grade of gasoline becomes very low, it inevitably attracts business from those other grades. If a service station cuts the price of third grade gasoline very substantially, it gets a great deal of business from people who, if the price were the same, would be buying the regular grade (Swensrud, R. 1404-5).

[7]Swensrud, R. 1392.

[8]See 233-4, *infra*.

[9]Swensrud, R. 1384, 1392.

[10]Swensrud, R. 1392-3, 1387-8. Of course, the first effects of an invasion by outside refiners would be felt in cities on the outskirts of the Mid-Western area, which are more easily reached by

E. Gasoline prices are unusually sensitive so that a small amount sold at a low price will necessarily defeat any attempt to maintain a high price.

The evidence heretofore discussed indicates that there were ample sources of competitive gasoline not controlled in any way by any of the alleged co-conspirators which could have come into the Mid-Western area. The tendency of such competition to defeat any attempt to set an arbitrary price for gasoline would be enhanced by the fact that gasoline prices are more sensitive than those of most commodities.

Most gasoline consumers are persons of moderate means who find it easy, because of the mobile nature of the automobile, to shop for bargains. Business is conducted "right out in the street", and price cuts are given a maximum of publicity. The public also knows that most gasolines of the same grade are pretty much the same; and that even if an unbranded product proves unsatisfactory it will soon be consumed without harming the motor. So, for a variety of reasons, if an unbranded marketer cuts below the normal differential, the major companies and their distributors must either meet the cut or lose business.[1]

Swensrud gave several striking examples of this principle. In one case a group of major companies in California lost 18% of their business in three months by failing to meet a price cut.[2] In another, a Columbus, Ohio service

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refiners outside of the indictment territory. However, as the outside refiners captured the market in these outlying districts the respondents and their alleged co-conspirators would have had to sell more and more gasoline in the interior, thus driving the price down there. In any case, the difference in freight rates between outlying and interior cities is so small that outside gasoline would soon have been pouring into the interior (Swensrud, R. 1414-5).

[1]Swensrud, R. 1381-8, 1404-6.

[2]Swensrud, R. 1384-6.

station increased its daily sales from 8,254 to 24,696 to 261,350 gallons in successive months by cutting the price.[3] A privately branded operator in Detroit, operating on cheap gasoline from Roumania, built up the biggest gallonage in the city by means of a two cent cut. Within a year he was taking trade from other stations within a fifty mile radius due to the fact that through traffic delayed refueling until it reached Detroit.[4] No group could have set an arbitrary price for gasoline in the Mid-Western area unless it controlled practically the whole market. 85% would not have been enough; 50% would have been still less effective.[5]

F. The effect of competition from Standard of Indiana.

The last section described in general terms the results which might be expected if the respondents and their alleged co-conspirators had attempted to maintain high, arbitrary and non-competitive prices in the Mid-Western area. The record also shows, however, that if only one company—Standard Oil Company (Indiana)—were not a party to the alleged conspiracy, it would be impossible to maintain such prices.

In 1911 Standard controlled from 75 to 80% of the business in the Mid-Western area.[1] Since then some twenty major companies have invaded the area. They have cut into Standard's share of the business until in 1935 it had only 22%.[2] Standard is still, however, the largest competitive factor in the area,[3] and it is engaged in bitter com-

[3]Swensrud, R. 1385-7.
[4]Swensrud, R. 1387.
[5]Swensrud, R. 1388, 1391.
[1]Marshall, R. 1247.
[2]Marshall, R. 1245-6.
[3]Def. Ex. 1028, R. 3812, 3813.

petition with the other major companies to maintain its share of the gallonage.[4] At times it has posted subnormal prices in 1600 different cities and at over 1300 of its bulk stations to meet competition.[5] One general price cut which it made in September 1934 reduced the retail market throughout the area by 1.6¢.[6]

In the last analysis the retail price of a standardized product such as gasoline must be "the price at which the low seller decided to sell his product."[7] When a marketer controlling 22% of the business and having 4,000 bulk stations, as Standard does, cuts the price, *everyone* must follow.[8] In effect, Standard's normal service station price represents the maximum price which anyone can charge for gasoline in the territory. If Standard cuts the normal price, the other major companies have to follow. Once it is reduced, they have to keep it down until Standard sees fit to raise it again.[9] Occasionally some of the major companies fail to follow Standard when it raises the price and Standard has to fall back.[10] But Standard can break any price established by anyone else.[11]

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[4]Marshall, R. 1231-2.
[5]Def. Ex. 911, R. 3510.
[6]Marshall, R. 1236-7.
[7]Marshall, R. 1244.
[8]Marshall, R. 1246-7; 1233; Swensrud, R. 1388.
[9]Shatford, R. 1085.
[10]Marshall, cross, R. 1249-50.
[11]Swensrud, R. 1388. See Shatford, R. 1085.

XI.

The Petroleum Administration and the buying activities of the defendants.

It will be recalled that the scope of the stabiliation activities undertaken by Arnott under the letter of July 20, 1934 had expanded very rapidly during the fall of 1934. Originally, the stabilization committees had dealt solely with local price wars, attempting to treat each locality as a separate problem.[1] When this failed, however, larger meetings were called which dealt first with the problems of entire states and then with the problems of groups of states.[2] Finally, in the General Stabilization Meetings which began in September, 1934, Arnott and his associates treated the entire Mid-Western area as a unit, stabilizing markets over the whole area at once.[3]

As time went on it became apparent that no permanent stabilization of the retail market could be accomplished unless the tank-car or wholesale gasoline market were stabilized too.[4] The independent refiners, who suffered most severely from the depressed tank-car market, threatened that unless something were done to remedy the situation they would not only withdraw from stabilization activities but abandon the Code entirely and cut the price of crude oil.[5] On January 4, 1935, therefore, Arnott appointed the Tank-Car Stabilization Committee.[6] That committee, orig-

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[1]McDowell, R. 1173; Frey, R. 1275-6.

[2]Frey, R. 1276.

[3]McDowell, R. 1166, 1175, 1176, 1173; Frey, R. 1276, 1277; Arnott, R. 1688, 1689, 1728; cross, R. 1742-3.

[4]Arnott, R. 1695.

[5]Arnott, R. 1693-5; McDowell, R. 1168-9.

[6]McDowell, R. 1169; Arnott, R. 1696-7.

inally assigned to make a study of the situation,[7] finally organized and put into operation the Mid-Continent Buying Program.[8]

A. The period from appointment of the Tank-Car Stabilization Committee up to the report of the Blazer Committee.

1. *Reports before the Tank-Car Committee met.*

As noted above, the Petroleum Administrative Board was told about the appointment of the Tank-Car Stabilization Committee on at least two occasions before the committee held its first meeting. On January 9th Arnott reported the appointment to Marshall and Meyers of the Board, and the latter expressed great interest in the matter.[1] On January 28th, O'Shaughnessy of the committee wired Fahy that:

> "• • • this condition [stabilization of the retail markets] is not going to continue unless a supreme effort is made to get the tank-car price of gasoline up to a comparable basis with the crude structure. • • • Mr. Arnott, as chief stabilizer, appointed a committee for this purpose about three weeks ago, but because of a recent court decision in East Texas we have never met to discuss the situation. • • •"[2]

In his reply on February 1st,[3] Fahy stated:

> "• • • I am sure you know that the tank-car situation in relation to the price of crude is one about

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[7]McDowell, R. 1169; Arnott, R. 1696.

[8]Arnott, R. 1706.

[1]Arnott, R. 1698, 1699-700.

[2]Def. Ex. 893, R. 3491. The "recent court decision in East Texas" referred to was the *Panama* decision (Arnott, R. 1728).

[3]Def. Ex. 894, R. 392.

which we have no disagreement. How to bring about a correction is the stumbling block. I may say, however, that I see nothing in the recent Supreme Court decision which in any way affects endeavors to reach the solution."

2. *Arnott's letter to Fahy, February 20, 1935.*

On February 20, 1935, about two weeks after he had received McDowell's first report, and nine days after he had met Buckley for the first time, Arnott wrote Fahy:[4]

"There have been some very important developments in connection with marketing and also in connection with East Texas refiners to which I am giving considerable time and attention.

"I am holding a meeting in Chicago Monday and Tuesday, and on Friday of next week I am holding a meeting at Kansas City with the independent group of Mid-Continent refiners.[5]

"I shall not give you the details of these meetings now but when I visit Washington, which will be quite soon after my return from the West, will tell you all about it."

3. *Arnott's interview with Frey, February 25, 1935.*

At this time, Dr. Frey of the Petroleum Administrative Board was visiting the Board's Chicago office, where, according to a notation in the above letter,[6] he received a copy thereof.

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[4]Def. Ex. 969, R. 3692; Arnott, R. p. 1729.

[5]The first meeting referred to was the Texas State Stabilization Meeting of February 25 and 26, described at pp. 153-4, *supra*. The second, was the meeting of March 1, 1935, described at pp. 97-8, *supra*.

[6]Def. Ex. 969, R. 3692.

On February 25, while Arnott was conducting the Texas State stabilization meeting in Chicago, Frey sent word to him that he was there. Arnott saw him, told him what was happening at the meeting, and asked whether he thought it would be wise to come in, having in mind that the meeting was for the purpose of airing the difficulties between the Texas operators and those from other states. Frey replied that he did not think it was. Arnott then told him of the developments in connection with Neil Buckley, and said that Buckley was going to appear there that day and tell the group about the plans of the East Texas Refiners' Marketing Association. He also described some of the developments in the Mid-Continent.[7]

4. *The voluntary curtailment of refinery runs in March, 1935.*

In March, 1935, it will be recalled,[8] the National Coordinator of Refinery Allocations, acting with the knowledge and approval of the Federal Petroleum Administration, persuaded some twenty-two major companies (including all the respondents except Globe) to cooperate with the Administration by curtailing their manufacture of gasoline during March by some 960,000 barrels.

[*The respondents offered to prove* that the Petroleum Administration had been advised that one of the purposes of the plan was "to reduce the refinery output of major companies and thereby compel them to buy a part of their requirements from independent refiners:"][9]

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[7]Arnott, R. 1729-30; cross, R. 1745-6.
[8]See pp. 240, 251, *supra.*
[9]Shatford offer, R. 1016-8.

5. *Arnott's conference with the Petroleum Administrative Board, March 12, 1935.*

A few days later, on March 12, 1935, Arnott made the report which he had promised Fahy, the chairman of the Petroleum Administrative Board, in his letter of February 20th.[10] At this time, Fahy was deputy administrator of the oil industry.[11] Frey and Swanson of the Board were also present.[12]

When Arnott arrived, Fahy said that he was glad to see him and that Frey had reported what Arnott had told him in Chicago about developments in the Mid-Continent and East Texas. He said that he was quite interested and wanted to help.[13]

He then asked Arnott whether there was anything in his buying program activities which might be in conflict with the prohibition in the letter of July 20, 1934, against violating the anti-trust laws.[14]

Arnott replied that he did not think there was any such conflict,[15] and described what he was doing.[16] He gave Fahy a full picture of developments in the Mid-Continent, the report of the McDowell committee, and Buckley's ac-

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[10]Frey, R. 1267, 1271-2; Arnott, R. 1730; see Def. Ex. 969, R. 3692.

[11]Def. Exs. 974, R. 3696, 3700; 988, R. 3735.

[12]Frey, R. 1268, 1272; Arnott, R. 1730. Arnott was not quite sure whether Swanson was present (Arnott, R. 1730). At one point Frey thought that certain other employees of the Board and members of the General Stabilization Committee were present, but Arnott disagreed. (*Cf.* Frey, R. 1268, 1272; Arnott, R. 1730.)

[13]Arnott, R. 1730.

[14]Frey, R. 1285; cross, R. 1294; redirect, R. 1335; Arnott, R. 1730.

[15]Frey, R. 1285; redirect, R. 1335.

[16]Frey, redirect, R. 1335; Arnott, R. 1730.

tivities in East Texas. In general, he covered substantially the same ground which he covered at the District Allocators' meeting the next day.[17]

Arnott told the Board that arrangements had been made by which quite a large number of major companies would buy distress gasoline from independent refiners. He said that no pool had been formed for such purchases; that the buying was strictly informal; and that no refiner was committed to buy a definite quantity of gasoline.[18] He said that they hoped that the price of gasoline at the refinery could be improved by such informal buying and the lack of parity which had existed between the crude oil and the tank-car market eliminated. In other words, the crude price, the tank-car price, and the wholesale and retail prices would all be stabilized in relation to each other.[19]

The buying program was not the only subject discussed. Arnott also made a report on general stabilization, and part of the meeting was directed to discussing important problems of that nature, including developments in the retail situation.[20]

According to Fahy, both Fahy and Arnott agreed that the latter was engaged in this activity "on his own responsibility."[21] Arnott did not ask any formal or written approval of what was being done.[22] He testified that it did

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[17]Arnott, R. 1730.

[18]Frey, R. 1282-3.

[19]Frey, R. 1283.

[20]Frey, cross, R. 1292; redirect, R. 1335.

[21]Frey, cross, R. 1293, 1294, 1301, 1302; recross, R. 1338. Arnott believed that Frey was confused and that he made this statement at a subsequent meeting on May 8, 1935, and in a different connection (Arnott, R. 1730-1).

[22]Frey, R. 1279; cross, R. 1302; redirect, R. 1335-6; recross, R. 1338; Arnott, R. 1730.

not occur to him to do so.[23] He had been engaged in securing informal cooperative action in aid of the common interests and objectives of the Government and industry for the last two years.[24] He felt that the members of the Board thought that his plans were sound and hoped that they would work.[25] If he had thought that they disapproved, he would have discontinued his activities.[26]

Fahy was the responsible reporting officer of the Board whose duty it was to make reports to Secretary Ickes.[27] Frey did not know whether he did so in this case or not.[28]

B. The Blazer Committee.

In January, 1935, Secretary Ickes had appointed a committee known as "The Petroleum Code Survey Committee for Small Enterprises" under Paul Blazer, the president of the Ashland Refining Company in Kentucky.[1] The purpose of the Committee was to study the plight or condition of the small units in the oil industry and see how they had fared under the Code,[2] and to make recommendations as to what should be done to overcome the difficulties which faced the industry.[3] The members of the Com-

[23] Frey, redirect, R. 1335; Arnott, R. 1730.
[24] See pp. ——, *supra*.
[25] Arnott, R. 1730, 1731.
[26] Arnott, R. 1736.
[27] Frey, R. 1273; redirect, R. 1326.
[28] Frey, R. 1273.
[1] Frey, redirect, R. 1320; Swensrud, R. 1377.
[2] Swensrud, R. 1377.
[3] Frey, redirect, R. 1320. The committee was composed of Paul G. Blazer (Chairman), the President of the Ashland Refining Co. (an independent refiner), Sidney A. Swensrud, the Assistant to President, Standard Oil Co. (Ohio), (a large semi-integrated refiner), (Swensrud, R. 1375), Mason Hoagland, the President of the

mittee became Government employees, paid by the Government.[4] Secretary Ickes told them that he had received a number of complaints from various sections of the industry, particularly from small independent refiners, and that he wanted a committee of people who were familiar with their problems to study them and suggest remedies under the Code. The Committee worked from early in January until late in February, 1935, and submitted its report to Secretary Ickes about March 15.[5]

1. *The Committee's report.*

It appeared incidentally from Defendants' Exhibit 923 that the Committee recommended that unless wholesale gasoline prices advanced to approximate parity with crude oil prices within 30 days, the price of crude oil should be reduced until such parity was achieved. It also appeared incidentally from Arnott's testimony that the Committee suggested that it would be very helpful if the major companies would buy gasoline from independent refiners.[6]

As a matter of fact, one of the main features of the Committee's report was a reference to, and approval of, the buying of distress gasoline by the large refiners from the small ones.

In the following narrative we shall italicize the portions of the documents referred to which contain obvious references to such buying.

Spur Distributing Co., R. G. Allen, a member of the Central Proration Committee of California, and H. B. Fell, a labor leader (Frey, R. 1320-21).

[4]Frey, redirect, R. 1320.

[5]Frey, redirect, R. 1320; Swensrud, R. 1377.

[6]Arnott, R. 1734; Def. Ex. 923, R. 3529.

[*The respondents offered* the report itself[7] in evidence. It would have shown that the Committee reported the following facts as to the plight of the independent refiner and the causes thereof:

[Under the Code refinery labor costs increased by 25 to 50 per cent. There was an average increase in independent refinery operating costs of around six cents for each barrel of crude.

[Virtually all independent refineries East of the Rocky Mountains which were operating on legally produced crude oil were operating at a serious loss. Ten Western Pennsylvania refiners, considered typical, sustained a net loss of 32 cents for each barrel of crude. The independent refiner was worse off during the Code by 11½ cents a barrel, than during the period immediately preceding the N. I. R. A. The deficiency below the price at which the independent refiner could realize his costs and make a reasonable profit amounted to approximately 30 cents on each barrel of crude. In 1934 and the first two months of 1935, the independent refiner was forced to pay a price for crude which was out of proportion to the price of gasoline and which inevitably caused him a loss. On the basis of average costs, independent refiners in Oklahoma were losing from 7 cents to 9 cents a gallon in October, 1934, and about the same in February, 1935.

[It was often impossible, due to retail price wars, for independent refiners to secure for their gasoline even the published tank-car price.

[Independent refiners, complaining of their losses to the Blazer Committee, attributed them to (1) the fixing

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[7]Def. Ex. 924 for identification, R. 3530, 3558.

and maintaining of the price of crude at $1.00; (2) increased operating costs under the Code; (3) inability to realize even the quoted tank-car prices due to retail price wars.

[*The report would also have shown* that the Committee made the following finding and recommendations:

["Immediate relief is necessary if non-integranted refineries are not to be eliminated; it can come in only two forms.

1. An immediate and sustained increase in tank-car and retail gasoline prices to a parity with present crude prices, or

2. A reduction in the posted prices of crude oil to a parity with gasoline.

["We agree with the thought prevalent in the production branch of the Industry—that it would be more desirable for the solution to come from an increase in gasoline prices instead of a reduction in crude, but if it cannot be done one way it should be done the other way.

["*We favor making one more effort at raising gasoline prices.* Refiners, of course, will point out that almost continuously over the past year efforts have been directed toward that end with negligible results. But some improvement in the basic factors of the situation may have been accomplished, and possibly only the impetus of concerted buying is needed to obtain a decided change for the better. Interstate shipments of hot oil and its products apparently are being brought under control and if the oil states enforce proper allowables there should be an improvement in the supply side of the picture. *We know of nothing, apart from continued improvement in crude production con-*

trol, which would be so helpful to the tank-car price of gasoline at this time as the substantial buying of distress gasoline by major companies. We understand a program of this sort is being considered by the Industry now in connection with a broad stabilization program. We, therefore, urge that the Administrator give it his approval and active support.

[*"It should be possible to have such a program functioning quickly. Profiting by the mistake of previous efforts, and having to overcome the counter-effects of excessive quantities of hot gasoline and widespread disastrous retail price wars such as raged when a buying program was attempted last Fall, we believe such a program might be successful in raising both tank-car and retail prices to their proper level in relationship to crude oil prices.*

["If higher tank-car prices are obtained, we believe they can be sustained only by corresponding increases in retail gasoline prices; otherwise, the burden merely would be shifted from small refiners to small marketers, who in many instances have been in just as much distress as the refiners. We find that abnormally low retail prices can depress tank-car prices just as much as low tank-car prices can pull down the retail price structure. Thus it appears to be essential that both prices move up together.

["Unfortunately, many people outside the Industry who recognize the desirability of conserving petroleum reserves and who strongly favor the preservation of small enterprises, are likely to be the first to criticize a moderate increase in retail prices of gasoline, not realizing that in so doing they are striking directly at the non-integrated units and throwing the entire Industry into the hands of a few large integrated companies.

["If, however, gasoline prices do not advance to an approximate parity with crude prices by an early date, within thirty days or thereabouts, or if they do not continue in such parity thereafter, then we recommend an immediate reduction in the price of crude oil to a parity with refined products. On the basis of prices as of this date a reduction of about 20 cents a barrel would be required to bring crude oil and gasoline prices into parity on the basis of the ratio of 18.5 to 1 as set forth in Section 6 of Article III of the Code."]

2. *Fahy's memorandum to Secretary Ickes, March 22, 1935.*

[*The respondents also offered* a memorandum dated March 22, 1935,[8] analyzing the Blazer Report which Chairman Fahy of the Petroleum Administrative Board prepared for Secretary Ickes. This memorandum contained the following:

["This part of the report is very critical of the operation of the Code on small enterprises, that is, the non-integrated refiner who has had to pay the stabilized price for crude but who has been obliged to sell his products on an unstable market, out of parity with the price of crude. • • •

["After a very analytical discussion of the plight of the non-integrated refiner, the Committee recommends: [Quoting the Sections of the Report Set Out Above.]

["It is not the purpose of this memorandum to criticize or attempt to answer any of the findings or recommendations of the Committee; although the current improvement in tank-car price and the present fairly stabilized retail market is affording relief

[8]Def. Ex. 1030 for identification, R. 3869, 3870, 3873.

to some extent to the non-integrated refiner who, the report points out, has suffered most. In our opinion the report should be released immediately, and although we believe that it should not be accompanied by defense made by the Petroleum Administration against the positions taken by the Small Enterprise Committee, there are a number of things recommended which it would be well to do something about. Remembering that the Committee was appointed to do the very thing that it has done, namely, point out the effect of the Code on small enterprises the question now is whether action in accordance with the report, where action is recommended should be taken on the basis of this report without affording other elements in the industry an opportunity to be consulted. This meets with the following suggestion to you of the Bc .rd: *We believe success in Code administration, assuming that it is to continue, requires that some of the recommendations made should be adopted;* e. g., *we have encouraged stabilization efforts designed at this time to aid the independent refiner.*"]

Thus it appears that the Petroleum Administrative Board was "encouraging" the Mid-Continent buying program, and that the Secretary of the Interior was advised of that fact.

3. *Secretary Ickes' comments on the Blazer Report.*

When the Blazer Report was submitted, Secretary Ickes assembled the members of the Petroleum Administrative Board in his office and stated that he was in favor of industrial action to bring about parity between the prices of crude and the prices of gasoline. He further stated that if such parity were not achieved within three or four weeks

he was going to call a meeting of representatives of the industry to see what could be done about it.[9]

4. *Secretary Ickes' letter to B. P. Lientz, March 20, 1935.*

In March 1935, Secretary Ickes again expressed his opinion on the Blazer Report in a letter[10] to B. P. Lientz of Kansas City, Missouri, the relevant part of which reads as follows:

> "Concerning the independent refiners, other than those in California, it appears from the report of the Committee on Small Enterprise that the outstanding difficulty is due to the disparity between posted crude oil prices and refinery realizations. This situation has been deplorable for many months, *but it is my understanding that at present the activity of the Stabilization Committees is having a distinct effect in the improvement of refinery prices*, and that were it not for old contracts, many of which are badly shaded with respect to the posted price, the independent refiner is approaching a normal market structure."

5. *Exchange of telegrams and letters between Fahy and Blazer, April 23—May 7, 1935.*

[*The respondents offered to prove* that on March 26th Secretary Ickes thanked the Blazer Committee for its report, and asked it to stay in existence "to observe the progress made along the lines of your recommendations and also to be available for consultation."[11] On April 23, Fahy wired Blazer as follows:[12]

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[9]Frey, redirect, R. 1319.
[10]Def. Ex. 995, R. 3749.
[11]Def. Ex. 919 for identification, R. 3527.
[12]Def. Ex. 921 for identification, R. 3528.

["Would appreciate informal views your committee as to *whether gasoline prices have advanced to an approximate parity with crude prices so as to obviate present necessity for reduction in crude oil price* as recommended in refining conclusions and recommendations contained in report your committee."

[On the same day Blazer replied, also by wire, as follows:[13]

["Retel Glad to advise informal opinion our Committee there is now no need for reduction crude oil prices since *we consider tank-car gasoline prices now almost up to parity with sufficient additional advances anticipated in both tank-car and retail prices*—"

[On April 30, Blazer explained his Committee's action in a letter to Fahy as follows:[14]

["Referring to your wire of yesterday inquiring as to whether it would be agreeable to our Committee for you to publish the substance of our recent exchange of telegrams, I have communicated with a majority of the members of the Committee and have obtained their approval.

["It has been suggested, though, that it be clearly understood that our Committee in going on record that there is no need for a reduction in crude oil prices at this time is acting on the belief that small additional advances will be made in both tank-car and retail prices of gasoline.

["It appears to be the opinion of a majority of the Committee that at least another quarter cent

[13]Def. Ex. 922 for identification, R. 3528.
[14]Def. Ex. 993 for identification, R. 3746.

advance in tank-car prices is essential and that if such an advance should not occur within the near future, a decline of approximately 5 cents per barrel should be made in crude oil prices.

["*Our Committee has been very much pleased with the success of the program to stabilize tank-car markets. We believe it has been handled in a manner calculated to benefit the non-integrated refiners and without disadvantage to marketers.* Of course, the real question is whether, after parity of gasoline and crude oil prices has been obtained, they can be maintained without excessive continued buying by the major companies. It is the opinion of our Committee that the final answer to that question will be determined by the effectiveness of efforts to balance crude oil supply and demand. I believe I can speak for our entire Committee when I say that we believe fundamental conditions in the industry have been sufficiently improved to bring about and maintain prices for finished products which will justify $1.00 crude oil."

[On May 7, Fahy replied as follows:[15]

["I am writing to acknowledge your letter of April 30 and to express my appreciation of your courtesy in having the Committee render its informal opinion regarding the present relationship between crude oil prices and prices of petroleum products. The substance of the telegrams which we exchanged, amplified somewhat by your letter, has been included in a press statement prepared for today's release."]

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[15]Def. Ex. 994 for identification, R. 3748.

On the same day the Department of the Interior issued the following press release:[16]

"United States
Department of the Interior

Petroleum Administrative Board
Memorandum for the Press

FOR RELEASE TUESDAY, MAY 7, 1935.

When the Petroleum Code Survey Committee on Small Enterprise submitted its report to Petroleum Administrafor Harold L. Ickes, it included among its recommendations the statement that if wholesale gasoline prices did not advance to an approximate parity with crude prices within about thirty days, an immediate reduction should be made in the price of crude oil to a parity with refined products.

Approximately thirty days after the submission of the Committee's report, the Petroleum Administrative Board requested an informal opinion from the Committee, asking its views as to whether gasoline prices had advanced to an approximate parity with crude prices, so as to obviate any present necessity for the reduction in crude oil prices as recommended in the refining conclusions and recommendations contained in the report.

Mr. Paul Blazer, Chairman of the Committee, replied that he was glad to advise that the informal opinion of his Committee was that *there now is no need for a reduction in crude oil prices, but emphasized that the Committee, in reaching its informal conclusion, anticipated that small additional advances will be made in both tank-car and retail prices of gasoline.* The majority of the Committee, he stated, is of the opinion that at least another quarter cent advance in tank-car prices is

[16]Def. Ex. 923, R. 3529.

essential, and that if such an advance should not occur within the near future, a decline of approximately 5 cents per barrel should be made in crude oil prices.

The Committee also is of the opinion, Mr. Blazer stated, that the final answer to the question as to the maintenance of a parity between gasoline and crude oil prices, after it has been reached, will be determined by the effectiveness of efforts to balance crude oil supply and demand.

Mr. Blazer also expresses the Committee's belief that fundamental conditions in the industry have been sufficiently improved to bring about and maintain prices for finished products which will justify $1.00 crude oil."

C. The period from April 30th to the end of the Code.

1. *Arnott's conference with the Petroleum Administrative Board, May 8, 1935.*

In the meantime the Petroleum Administrative Board had received certain complaints as to the stabilization activities. Some of these complaints dealt with the question of representation at stabilization meetings; others with the fact that the meetings were closed or, it was charged, "secret." A number of them dealt with the so-called "Chicago moratorium."[1] This moratorium was the result of a recommendation of the Illinois Stabilization Committee to the effect that there should be no transfers of dealers among jobbers for a certain period of time.[2]

On April 2, 1935, Secretary Ickes had written Arnott as follows:[3]

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[1]Frey, cross, R. 1305.
[2]Frey, redirect, R. 1316.
[3]Govt. Ex. 980, R. 3722.

"My dear Mr. Arnott:

"I have just received a report from the Petroleum Administrative Board with respect to a moratorium on dealer accounts which is reported to have been arrived at by agreement between the companies supplying the major part of the gasoline sold in the Chicago area.

"Although no evidence has been presented which would definitely establish the basis for the agreement entered into, it is possible that the companies involved are purporting to act under the authorization of my letter of July 20, 1934, authorizing you to designate committees with authority to confer, to negotiate and to hold due public hearings in order to remedy unfair price situation.

"Several parties have complained to the Petroleum Administrative Board that the moratorium oppresses them. I am not attempting, however, in this letter to pass on the wisdom of the moratorium. The matter that at present concerns me is the necessity of complying with the requirements of the basic law. In authorizing the formulation of a stabilization program, I necessarily conditioned the authority granted, by providing that the requirements of Clause 2 of Subsection (a) of Section 3 of the National Industrial Recovery Act should be observed. I know you will appreciate that agreements between supplying companies which might be in conflict with the anti-trust laws of the United States require specific approval after due consideration if companies are to receive the protection afforded by Sections 4 and 5 of the National Industrial Recovery Act.

"I understand that the temporary character of a number of situations and the need for immediate action has made formalized agreements impra-

ticable and in a number of instances they may be unnecessary. However, when the understandings arrived at as bases of solution of price wars affecting the industry over a considerable area are intended to operate over a definite period of time or involve substantial changes in the policy of the various supplying companies made only in consideration of similar action on the part of other companies, it is necessary that the procedure required by the Recovery Act be followed in order that the arrangement be legal. If any such agreements have been made I should like a report as to them. If they require approval to be effective, as my information leads me to believe is the case with respect to the moratorium, I should be glad to give consideration to them under the provisions of the Act.

"I appreciate greatly your cooperation with the Administration in taking on the difficult work of directing a program of stabilization and I know that you will understand that this action is necessary in order to comply with the requirements of law with which I am charged with administrative responsibility.

"Sincerely yours,

(s) HAROLD L. ICKES,
Administrator."

On April 22 the Petroleum Administrative Board wrote Arnott another letter in which they imposed three conditions upon the conduct of the general stabilization work:

(1) That there should be no stabilization meetings unless a representative of the Board were present.

(2) That before any final decisions were made at such meetings, every element in the industry should have a chance to be heard.

(3) That no general instructions should be given under the letter of July 20, 1934.[4]

The members of the Stabilization Committee objected to this letter on the ground that it was impractical to operate under the conditions imposed. They contended that it was not always possible to have a Government representative present, that it was not always desirable to have all elements represented at one meeting, and they decided to go to Washington to see if something couldn't be done to change those conditions so that it would be possible to work more effectively in stabilization.[5]

The Petroleum Administrative Board was also anxious to see the members of the Committee. It had received reports from its field men as to certain activities which were being carried on under the stabilization program, and it wanted to know what was going on—to call Arnott on the carpet, and request him to explain what he was doing, and to confirm or deny the reports that had been received.[6]

On May 8, 1935, Arnott, Carnes, Jackson, Ashton and Majewski, of the Stabilization Committee, and J. D. Collett, the chairman of the Planning and Coordination Committee, met with Fahy and Frey in Washington.[7]

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[4] Frey, cross, R. 1305; Arnott, R. 1731
[5] Frey, cross, R. 1305
[6] Frey, cross, R. 1306
[7] Frey, cross, R. 1306-7; redirect, R. 1315, 1337

The meeting was primarily devoted to the general problems of stabilization,[8] to a discussion of the methods to be used by the Stabilization Committee in carrying on meetings, and things of that sort.[9]

It was a rather "warm" session.[10] There was a good deal of heat at the beginning because Arnott thought that the Board should not have dealt with outside complainants without first informing him. "He came in prepared to tear up the place, and proceeded to do it for a considerable length of time. There were some very hot exchanges between Mr. Fahy and Mr. Arnott. * * * But after we got to understand each other, things calmed down, and we decided on how we would proceed."[11]

Arnott's group considered the conditions imposed by the Board's requests in its letter of April 22 quite impossible. Finally, the Board decided to have R. N. Moore of its Chicago office and M. Q. Shaughnessy of its legal staff work the problem out with Majewski.[12]

At the close of the meeting, just before it broke up,[13] there was some incidental discussion of the buying program.[14] Fahy asked Arnott whether the buying was continuing,[15] or "How is the buying coming along?"[16] Arnott replied, "All right, so far as I know,"[17] and said that the

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[8]Frey, cross, R. 1305.
[9]Frey, cross, R. 1302.
[10]Frey, redirect, R. 1335.
[11]Frey, redirect, R. 1336.
[12]Frey, redirect, R. 1337.
[13]Frey, redirect, R. 1335, 1337.
[14]Frey, cross, R. 1302; redirect, R. 1335.
[15]Frey, redirect, R. 1335.
[16]Arnott, R. 1731.
[17]*Ibid.*

buying was still going on on an informal basis. Then he more or less repeated what he had said on March 12.[18]

According to Frey, Fahy or someone else also asked Arnott whether he was taking the letter of July 20, 1934, as the authority for his buying program work,[19] and Arnott replied that he was not.[20] He might also have said that he wasn't asking the board's "blessing," although Frey was not sure about that.[21] Frey also thought that Fahy stated to Arnott definitely (although he was not sure of the exact words)[22] that the letter of July 20 gave him no authority, and that he had no authority under the Code to operate a buying program.[23] Nothing was said about approving the program, however, "either one way or the other."[24]

Arnott's recollection was different. He said:

> "In answer to that [letter of April 22], and in the discussion that followed, I stated that, in line with the letter of July 20th that had been sent to me, that necessarily in carrying on the stabilization work I would, and I felt the letter required, make decisions when they were necessary. Furthermore, in making those decisions, there were times when I would have to use my discretion. There was a matter of bringing different elements in and different subjects to discuss at stabilization meetings, and in bringing them together and discussing them I had to use my own discretion.

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[18]Frey, redirect, R. 1336-7.
[19]Frey, redirect, R. 1335.
[20]Frey, R. 1336.
[21]Frey, R. 1294, 1308.
[22]Frey, cross, R. 1307.
[23]Frey, cross, R. 1299-1301, 1307; recross, R. 1337-8.
[24]Frey, redirect, R. 1335.

and do it on my own responsibility. And in the matter of these meetings, in the matter of these decisions and using my discretion, I was taking the responsibility for them.

"I recall no statement at the meeting of May 8th, by me or any member of the Petroleum Administrative Board, that I had no authority under the letter of July 20th or under the Code for operating a buying program."[25]

J. D. Collett, who attended the meeting as chairman of the Planning and Coordination Committee, testified that his recollection of the meeting was in accord with Arnott's.[26]

2. *Arnott's conference with Fahy, May 10, 1935.*

In April Fahy had requested the Planning and Coordination Committee to review the Blazer Report with the Marketing Committee and to give the Board its comments.[27] The Planning and Coordination Committee appointed a committee of three, consisting of Arnott, Collett and Majewski, to discuss the matter with the Petroleum Administrative Board.[28]

The Committee met with Fahy in his office on May 10, 1935,[29] and discussed the Blazer Committee's comments on the position of the independent refiners and its recom-

[25]Arnott, R. 1732.

[26]Collett, R. 1802-3.

[27]Arnott, R. 1732; Collett, R. 1803. In this connection, Arnott sent a telegram (Def. Ex. 970, R. p. 3693) to the members of the Marketing Committee, asking them to meet in Washington on May 9 to consider the matters. (Arnott, R. 1732.)

[28]Arnott, R. 1733; Collett, R. 1803.

[29]Arnott, R. 1731, 1733.

mendations with respect thereto.[30] It was noted that the Committee had recommended that the major companies should buy distress gasoline from independent refiners. Arnott and Majewski pointed out that this was already being done.[31] It was also pointed out that this buying had already resulted in some improvement in the situation so that the complaints of the independent refiners were diminishing, and that the system of refinery allocations and the major companies' voluntary curtailment of refinery runs in March, discussed above, had contributed still further to the improvement of the situation.[32]

Fahy replied "that is quite so and disposes of that part of th[e] report."[33]

3. *Fahy's request to Arnott to stabilize the Pennsylvania refinery market, May 14, 1935.*

[*The respondents offered to prove* that on May 14, 1935, less than a week after the conference of May 8th, Fahy, as chairman of the Petroleum Administrative Board, asked Arnott to undertake to stabilize the Pennsylvania refinery market in the same way that he had stabilized the Mid-Continent refinery market and that in connection with this request the Board gave unmistakable evidence of its support and approval of the Mid-Continent buying program. The excluded evidence was as follows:

[The situation of the Pennsylvania refiners was essentially the same as that of the Mid-Continent refiners ex-

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[30]Arnott, R. 1733, 1734.

[31]Arnott, R. 1734; Collett, R. 1803.

[32]Collett, R. 1803; cross, R. 1806. See pp. 240, 251, 276, *supra*.

[33]Arnott, R. 1734.

cept that their principal product was not gasoline but lubricating oil. The price of such products was depressed in relation to that of crude oil and the refiners were suffering severely from the disparity between the two. The price of products was, however, more depressed than that of crude oil, and the refiners were suffering severely from the disparity between the two. They had also built up excessive inventories which could be sold only at distress prices, and many of them were being forced out of business.[34]

[These facts were well known to Fahy, Swanson and Frey of the Petroleum Administrative Board through reports from agents in the field and through reports from W. J. Brundred, the vice-president of the Central Pennsylvania Oil Producers' Association.[35]

[When the Blazer Report was released, it pointed out vividly the difficulties of the small independent refiners in Pennsylvania. It showed that Pennsylvania refiners were losing 32 cents on each barrel of crude oil refined. S. M. Vockel, the president of the Waverly Oil Works (a Pennsylvania refiner), decided to call this to the attention of the Petroleum Administrative Board. On April 2, 1935 he telephoned the Board in Washington, and explained his difficulties to Swanson. The latter suggested that he come to Washington.[36] On April 8, 1935 Vockel and G. E. Willey, his vice-president, had a two-hour conference with Chairman Fahy, and Swanson, of the Board, and Ben

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[34]Frey offer, R. 1288, 1289.

[35]Frey offer, R. 1288, 1289; Brundred offer, R. 1354, 1355, 1356. The other two members of the Board, Marshall and Meyers, had been out of town for several months. (Frey offer, R. 1289.)

[36]Vockel offer, R. 1345, 1346.

Lindsey, a Board geologist who was familiar with the general situation in Pennsylvania. Vockel told them that his company secured Pennsylvania grade crude oil in the south-western district of Pennsylvania, and was having to pay $2.02 a barrel for it; there having been two recent price rises of 15 cents each. He said that he could see no justification for the 30-cent rise in the price of crude oil; that the market prices for finished products had been dropping month by month; and that since the recent crude price rises the small Pennsylvania refiner could not sell his products for enough to cover his costs when he sold his finished products. In conclusion, he asked the Petroleum Administrative Board to take steps to cancel the 30-cent price rise for crude in Pennsylvania.[37]

[Fahy and Swanson recognized that the prices for finished products were too low in relation to the price of Pennsylvania crude oil, but they were evasive to Vockel's request. Swanson told him that the Stabilization Committee of the Planning and Coordination Committee was doing a very useful and constructive job in stabilizing the refinery gasoline market in the south-western states. He said that they expected that this Stabilization Committee work would continue; that there would be further rises in the price of refinery gasoline in the Mid-Continent area; and that the effect of this stabilization work and these price rises would soon be reflected through the entire industry. He said that during the next several weeks the useful and constructive work of the Stabilization Committee in the Mid-Continent area would bring the price of refinery gasoline more in line with the price of Mid-Continent crude

[37]Vockel offer, R. 1346-7.

oil; that they expected that this would cause prices for refined products in Pennsylvania to rise within thirty days; and that the Stabilization Committee work was already helping the refiners and others in the mid-western states. Both Fahy and Swanson gave Vockel the impression that the Board was backing the Stabilization Committee work in the Mid-Continent area.[38]

[Vockel said that he would wait thirty days to see whether Pennsylvania would be benefited by the work of the Stabilization Committee in the southwestern states in connection with refinery gasoline markets. Fahy and Swanson told him that if it were not he should come back and they would again consider the problem.[39]

[On May 7th, Vockel received a letter[40] from E. B. Swanson, writing on behalf of the Board, saying:

> ["I feel sure you will appreciate that every effort has been made and is being made under the Petroleum Code to make possible the profitable operation of petroleum refineries. Although this objective has been difficult of attainment, considerable progress in that direction has been made during the past several weeks, and it is my understanding that under the present relationship between crude oil prices and the prices for petroleum products most refining companies are able to operate satisfactorily."

[On May 13, 1935, Vockel and Willey had another conference, lasting about fifteen minutes, with Fahy, Swanson, and Frey, of the Petroleum Administrative Board. Vockel told them that, contrary to the Board's prediction,

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[38]Vockel offer, R. 1347-8.
[39]Vockel offer, R. 1348-9.
[40]Def. Ex. 972 for identification, R. 3694.

the Stabilization Committee work in the Mid-Continent area had not been reflected back into Pennsylvania, and that the prices of refined products in Pennsylvania had not risen. He again asked that the Board take steps to cause the price of crude oil in Pennsylvania to be reduced thirty cents a barrel.[41]

[The members of the Board said that the Pennsylvania refiners would have to be patient for a few weeks more,[42] and that they still expected that the work of the Stabilization Committee in connection with the refinery gasoline in the southwestern states would have a good effect on the prices for finished products in Pennsylvania.[43]

[Vockel and Willey then went back to their hotel, and sat up until three o'clock in the morning trying to determine whether or not they would close their refinery. Finally they decided to ask their Senator to intercede with the Petroleum Administrative Board. The next morning Vockel went to the office of Senator Davis of Pennsylvania. When he got back to the hotel, Swanson phoned him and arranged for a conference at twelve o'clock.[44]

[Fahy, and Swanson, and Frey were present, and the conference lasted about five or ten minutes. Fahy said that they had been considering the Pennsylvania situation, that the Board felt that it had arrived at a plan which would help, and that it was sending the following telegram,[45] to Arnott, at Tulsa, Oklahoma:[46]

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[41]Frey offer, R. 1287; Vockel offer, R. 1350.
[42]Vockel offer, R. 1350.
[43]Frey offer, R. 1288.
[44]Vockel offer, R. 1350-1.
[45]Def. Ex. 916 for identification, R. 3520.
[46]Frey offer, R. 1288; Vockel offer, R. 1351.

["Mr. C. E. Arnott
c/o American Petroleum Institute
Mayo Hotel
Tulsa, Oklahoma

["S. M. Vockel and C. E. Willey officials Waverly Oil Works on behalf own company and other small Pennsylvania refiners yesterday and today presented detailed picture refining situation their section. Present disparity between Pennsylvania grade crude and refiner prices undoubtedly makes impossible continued operation several plans. Problem there related more to stabilized markets lubricants than gasoline. Hope you can arrange for prompt consideration this problem by Stabilization Committee looking both to immediate adjustments as well as long view correction. Would appreciate your assistance in his situation as it involves plants of long establishment which undoubtedly have not benefited equally with others under stabilization program because of their dependence on lubricants rather than gasoline. Please wire me as to possibility your undertaking this.

["Charles Fahy."].

[The members of the Board did not state what they thought Mr. Arnott could do to help the Pennsylvania refiners, but they made some comments along the line that the Petroleum Administrative Board was back of the problem and would help the Pennsylvania refiners.[47] They also said that they thought Arnott would look into the situation and that he would be able to help them in a very short time,[48] and they indicated that Arnott and

[47]Frey offer, R. 1289; Vockel offer, R. 1352.
[48]Frey offer, R. 1289.

the Stabilization Committee would do for the refiners in Pennsylvania regarding their lubricants what was being done for the independent refiners in the Mid-Continent area regarding their gasoline[49]

[On May 16, Arnott replied to Fahy's telegram as follows:[50]

["Replying your telegram fully realize situation you refer to and quite agree something must be done. Will go into immediately on my return to New York next week and feel can accomplish something constructive for refiners you mentioned and others interested."

[Fahy replied by wire:[51]

["Thanks very much your telegram re Pennsylvania situation."

[On May 17th Swanson wrote Brundred as follows:[52]

["Mr. Fahy has asked me to acknowledge your letter to him of May 9, which I am doing by informing you of some developments here during the week.

["Messrs. Vockel and Willey, on behalf of their own company and other Pennsylvania refiners were in Washington on Monday and Tuesday of this week and conferred at some length with Mr. Fahy, Dr. Frey and myself. As a result of these conferences it was felt that the Stabilization Committee of the Planning and Coordination Committee, which is un-

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[49]Vockel offer, R. 1352.

[50]Def. Ex. 916 for identification, R. 3521.

[51]Def. Ex. 971 for identification, R. 3693.

[52]Def. Ex. 915 for identification, R. 3519; Brundred offer, R. 1355.

der the chairmanship of Mr. C. E. Arnott, might be of definite assistance in connection with lubricants as they have been in connection with gasoline.

["Following this thought, Mr. Fahy telegraphed to Mr. Arnott in Tulsa, and yesterday received a reply stating that Mr. Arnott would be in New York early next week and would take the matter up; and that he thought some good could be accomplished for the refiners and others in the Pennsylvania grade territory."

[Thereafter Arnott undertook to help the Pennsylvania refiners. He made a survey in Pennsylvania and called a meeting of the Pennsylvania refiners, for May 28, 1935, at the Waldorf Hotel in New York. Swanson was invited, but, on account of the *Schechter* decision, the day before, he did not go. It was Frey's understanding that the meeting was never held.[53]

[*The respondents also offered to prove,* through Frey, that in sending the telegram of May 14th the Petroleum Administrative Board wanted Arnott to go into Pennsylvania to treat the refinery lubricant market by the same method that the Stabilization Committee had used on the refinery gasoline market in the Mid-Continent area. Because of the excessive inventories of lubricants overhanging the Pennsylvania market, the Board believed that Arnott could make some arrangements whereby the major companies would purchase lubricants from the small independent refiner and in that way both relieve the plight of the independent refiner and cause the prices of refinery finished products to rise to their proper parity with the price of Pennsylvania

[53]Frey offer, R. 1290.

grade crude oil. Before sending the telegram of May 14, 1935, the Petroleum Administrative Board considered that Mr. Arnott had the authority to undertake this work in Pennsylvania because it was part of the stabilization work which he was authorized to undertake.[54]]

D. After the Code.

With the *Schechter* decision on May 29th Arnott's activities as chairman of the Marketing Committee and as "Stabilizer," under Secretary Ickes' letter of July 20th, came to an end.[1] He was thanked by Fahy, Deputy Oil Administrator, and by Secretary Ickes, for his services.[2]

1. *The Secretary of the Interior's Annual Report for 1935.*

Toward the end of 1935 there appeared the Annual Report of the Secretary of the Interior,[3] which referred to the stabilization of the tank-car market in 1935 as follows:

> "The operations of the Tender Board, of the production provisions of the code and refinery amendment, and of the stabilization committee of the planning and coordination committee with the cooperation of the Petroleum Administrative Board, brought the desired parity between the wholesale price of gasoline and crude oil in the spring of 1935. • • •"

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[54]Frey offer, R. 1289-90.
[1]Def. Ex. 975, R. 3716.
[2]Def. Ex. 976, R. 3716.
[3]Def. Ex. 917, R. 3522, 3525.

2. *The Final Report of the Marketing Division of the Petroleum Administrative Board.*

In December, 1935 and January and February, 1936, the Marketing Division of the Petroleum Administrative Board prepared a "Final Report"[4] under the supervision of Dr. Frey. Subsequently this report was published by the Department of the Interior.[5]

[*The respondents offered* certain portions of this report in evidence. The relevant portions of the excluded exhibit are as follows:

"Stabilization

["By the middle of 1934, many retail price wars in different parts of the country had developed into a serious problem. Rebating and secret discounting in violation of the code were usually prevalent in the affected areas and rules 3, 4, 6 and 17 were most flagrantly violated. After these matters were brought to the attention of the Administrator, he wrote on July 20, 1934, to the chairman of the Marketing Subcommittee of the Planning and Coordination Committee authorizing the establishment of local committees to deal with gasoline price wars and to negotiate settlements in the areas affected. This letter read in part: * * *[quoting Secretary Ickes' letter of July 20, 1934 to Arnott.]

["The event that led up to the Administrator's request was a series of unsuccessful attempts on the part of the Board and the code committees to secure settlements of retail price controversies. The Planning and Coordination Committee had

[4]Def. Ex. 914 for identification, R. 3512.
[5]Frey, R. 1281.

substituted for its proposal for retail price fixing the national marketing agreement which had not been approved by the industry or by the Administrator. In view of these conditions the purpose of the Administrator's letter was to request the industry, within the limits of existing law to undertake to stabilize markets with a view to achieving the purposes of the Recovery Act.

["The chairman of the marketing sub-committee of the Planning and Coordination Committee effectuating the request of the Administrator organized a General Stabilization Committee and authorized the chairman of each regional marketing committee to instruct the various State code committee chairman to appoint State stabilization committees wherever necessary * * *.

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["As the various problems were offered for discussion at the general stabilization committee meetings, subcommittees were appointed to make recommendations among these subcommittees. One of the most important was the tank-car committee, which attempted to get the tank-car market raised more in line with the price of crude recovery cost on the theory that a firm tank-car market was essential to a stabilized retail structure * * *.

["The stabilization program was perhaps the outstanding development under the code. It received the support of most elements in the industry and it was effective to a greater degree in eliminating price wars and stabilizing prices and conditions than any other movement yet tried. In many areas the best price structure in years prevailed during the last 6 months of the code. Nearly all company representatives gave credit for this condition to the stabilization program.

["Although no authority existed in the stabilization committee to enforce any of the recommendations which it might make, its recommendations were generally effective. This was largely because its aims and purposes were to maintain a uniform and profitable price structure by as nearly direct means as possible. Many critics of the code were ardent supporters of the stabilization program, feeling the code was cumbersome and the machinery for its enforcement so complex as to be ineffectual, but that the stabilization program went to the heart of the problem and was more effective."]

3. *Testimony of Secretary Ickes and E. B. Swanson before the Senate Committee on Finance, February 12, 1937.*

[*The respondents offered to show* that Secretary Ickes and E. B. Swanson (one of the members of the Petroleum Administrative Board during the indictment period) testified as follows before the Senate Committee on Finance on February 12, 1937:

["'Senator Connally: Mr. Holland is in possession, is he, of the details in regard to those buying pools and things of that kind?

["'Secretary Ickes: Mr. Holland or Mr. Swanson has all of that, because he was with the Oil Administration at the time.

["'Senator Connally: Would it bother you if we would hear Mr. Swanson, injecting him right at this point?

["'Secretary Ickes: I should be very glad to have you do that.

["'Senator Connally: "What was the operation under those buying pools, Mr. Swanson"?

[" 'Mr. Swanson: Mr. Chairman there were several so-called buying pool efforts, that began in December of 1933 and continued from then on during the entire period of the Petroleum Code.

[" 'Senator Connally: What was the purpose of the Department in participating or in authorizing or in aiding those buying pools?

[" 'Mr. Swanson: It was an effort on the Department and the industrial committees to bring about the normal relationship between gasoline prices and crude oil prices, in order to permit the independent, non-integrated refiner to be able to operate without loss.

[" 'Senator Connally: What do you figure is the proper relationship between the price of crude and gasoline?

[" 'Mr. Swanson: It varies with different price levels, but at a crude oil price of one dollar, the normal price relationship between crude oil and gasoline is as eighteen and one-half is to one. In other words, the crude oil price per barrel should be eighteen and one-half times the refinery price per gallon of regular gasoline'."[6]]

4. *Frey's testimony.*

As noted above, the Petroleum Administrative Board was rather departmentalized, with each member handling an individual field and consulting the others only at irregular intervals. The member in charge of marketing was Dr. John W. Frey.[7] He had been specifically designated by Secretary Ickes: "to negotiate and sit with Committees of those engaged in the stabilization of whole-

[6]R. 1841-2.
[7]Frey, R. 1265.

sale and retail markets throughout large areas of the United States."[8]

Dr. Frey (now an associate director of the Petroleum Conservation Division of the Department of the Interior)[9] testified:

(1) That although he had never had any direct contact with the Tank-car Stabilization Committee's work and was "not familiar with its detailed operations,"[10] Arnott had made reports about the Committee to the Board,[11] and he (Frey) was familiar with the Committee's objectives.[12]

(2) That in his opinion the Tank-Car Stabilization Committee was "an offshoot" of the General Stabilization Committee[13] which had been appointed under authority of the letter of July 20, 1934.[14]

(3) That Arnott had never asked the Petroleum Administrative Board for official approval or official criticism of the Committee's activities.[15]

(4) That, so far as he was concerned, the Mid-Continent buying program was an industry activity, without any official standing. That is to say, it had not been formally authorized by anybody in the Petroleum Admin-

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[8]Def. Ex. 974, R. 3696, 3710.

[9]Frey, R. 1263.

[10]Frey, R. 1266, 1267; cross, R. 1302.

[11]Frey, R. 1282, 1286, 1303. Arnott, of course, made no such reports after May 27, 1935 (Frey, R. 1314).

[12]Frey, R. 1266.

[13]*Ibid.*

[14]Frey, R. 1291.

[15]Frey, cross, R. 1294, 1307; redirect, R 1335, 1336.

istrative Board nor by the Secretary of the Interior.[16] In fact, only Secretary Ickes could have given such formal authorization.[17]

(5) That he believed that major company buying was helpful to stabilization.[18] For, although many price wars in the Mid-Western area had been eliminated by January, 1935, and conditions were much better, other price wars were still going on. Furthermore, the Petroleum Administrative Board had repeatedly found that, although the stabilization activities might have achieved "a decided benefit, . . . usually they would slide back after a relatively short time."[19] That the sale of gasoline at distress prices was frequently responsible for these price wars and "encouraged the number" of them by furnishing low-priced gasoline to price-cutters and thus permitting them to sell at a greater differential below the regular price of the major companies.[20] In his judgment, it was impossible to maintain a stabilized retail market if the tank-car market continued to be subnormal.[21]

(6) That in his opinion, the presence of distress gasoline on the market in January and February 1935 was also one of the obstacles which was preventing the tank-car market from achieving parity with the price of crude oil.[22]

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[16]Frey, cross, R. 1293.
[17]Frey, R. 1270, 1279.
[18]Frey, redirect, R. 1315-6.
[19]Frey, R. 1277.
[20]Frey, redirect, R. 1328.
[21]Frey, redirect, R. 1332.
[22]Frey, redirect, R. 1327.

(7) That Secretary Ickes considered it an undesirable state of affairs, and particularly hard on the independent refiners, for the price of gasoline at the refinery to be out of parity with the price of crude oil.[23]

[23] Frey, redirect, R. 1328.